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Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book, or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 979

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, of Liverpool, England (a Corporation),
Plaintiff in Error,

vs.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the Northern District of California.

The Filmer Bros. Co. Print, 424 Sansome St., S. F.

Records of Grand
Court of Apollo

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In the United States Circuit Court of Appeals for the Ninth Circuit.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND (a Corporation),

Plaintiff in Error,

vs.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),

Defendant in Error.

Order Extending Time to Docket Cause and File Record.

Good cause being shown therefor, and pursuant to subdivision 1 of rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit, it is ordered that the plaintiff in error in the above-entitled action do have twenty (20) days' further time from and after the 17th day of July, 1903, within which to file the record thereof and docket the case with the clerk of said court.

Dated at San Franisco, this 14th day of July, 1903.

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: No. 979. United States Circuit Court of Appeals, for the Ninth Circuit. The Standard Marine Insurance Company, Limited, of Liverpool, England (a Corporation), Plaintiff in Error, vs. Nome Beach Lighterage and Transportation Company, Defendant in Error.

Order Extending Time to Docket Cause and File Record. Filed July 14, 1903. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND (a Corporation),

Plaintiff in Error,

vs.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),

Defendant in Error.

Order Extending Time to Docket Cause and FileRecord.

Good cause being shown therefor, and pursuant to subdivision 1 of rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit, it is ordered that the plaintiff in error in the above-entitled action do have five (5) days' further time from and after the 6th day of August, 1903, within which to file the record thereof and docket the case with the clerk of said court.

Dated at San Francisco, this 6th day of August, 1903.

WM. W. MORROW,

United States Circuit Judge.

[Endorsed]: No. 979. United States Circuit Court of Appeals for the Ninth Circuit. The Standard Marine

Insurance Company, Limited, of Liverpool, England (a Corporation), Plaintiff in Error, vs. Nome Beach Lighterage and Transportation Company, Defendant in Error. Order Extending Time to Docket Cause and File Record. Filed Aug. 6, 1903. F. D. Monckton, Clerk.

In the United States Circuit Court in and for the Northern District of California, Ninth Circuit.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),
Plaintiff,
vs.
THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND (a Corporation),
Defendant.

Complaint.

Plaintiff above named, complaining of the defendant above named, for cause of action alleges, that:

I.

At all the times hereinafter mentioned the said plaintiff was and still is, a corporation, organized under the laws of the State of California, with its principal place of business at the city and county of San Francisco, in said State.

II.

At all the times hereinafter mentioned the said defendant was, and still is, a corporation, organized under

the laws of the United Kingdom of Great Britain and Ireland, with its principal place of business at Liverpool, England, and having an agency and doing business in the city and county of San Francisco, State of California.

III.

That on the 2d day of May, 1900, the said defendant issued its policy of insurance to said plaintiff, wherein and whereby the said defendant for and in consideration of the sum of two hundred and eighty-one and 25-100 (281.25) dollars, then and there paid to it by said plaintiff, did insure upon said plaintiff's account, in case of loss to be paid to said plaintiff, certain merchandise laden or to be laden on and under deck on board the good barkentine "Catherine Sudden," for a voyage at and from San Francisco to Cape Nome, Alaska, beginning the said adventure upon said property upon and immediately following the loading thereof on board said vessel at San Francisco, and to continue and endure until thirty days after arrival or at ship's tackle at Cape Nome, Alaska.

Said defendant further in and by said policy of insurance agreed to, and then and there did, insure the said plaintiff said merchandise for the said voyage against perils of the sea, fire, pirates, assailing thieves, jettisons, barratry of master or mariners and all other losses and misfortunes that have or shall come to the hurt damage or detriment of the said property to which insurers are liable by the rules and customs of insurance in San Francisco, excepting such losses and misfortunes as are excluded by said policy.

Said defendant further in and by said policy agreed that the property so insured was of the value following, to wit: the property stowed under deck was of the value of five thousand two hundred and fifty (5,250) dollars, and the property stowed upon deck was of the value of three thousand (3,000) dollars, and that in case of loss of said merchandise by any of the perils insured against in said policy, it, the said defendant would pay the said loss in sixty days after proof and adjustment of loss, and proof of interest in the property insured. A copy of said policy is hereto attached, marked Exhibit "A," and hereby referred to and made a part hereof.

IV.

All of said merchandise in said policy insured was at the port of San Francisco laden as cargo on board said barkentine "Catherine Sudden" as in said policy provided, and the said vessel with the said merchandise on board thereof then and there set sail from San Francisco upon the voyage in said policy mentioned.

Thereafter, to wit on the 3d day of June, 1900, and while said vessel was proceeding upon the said voyage, the whole of said merchandise was totally lost by perils of the sea, to the damage of said plaintiff in the sum of eight thousand two hundred and fifty (8,250) dollars.

V.

That thereafter, the said merchandise under deck, by and with the consent of the agent of said defendant, was duly sold in one lot at public auction, for account of whom it might concern, and the proceeds of said sale, the exact amount of which this plaintiff has been unable

to ascertain, but which said plaintiff, upon its information and belief, alleges did not exceed the sum of five hundred (500) dollars, has never come to the hands of or into the possession of this plaintiff, but was retained by the salvors of the said merchandise to be applied to their claim for salvage upon the same.

VI.

That at the time of the application for and making of said contract of insurance hereinbefore set forth, and thereafter and up to and including the loss of said property as herein set forth, the said plaintiff was the owner of said merchandise.

VII.

That the said vessel "Catherine Sudden" was at the time of the effecting of said insurance, and at the time of her departure upon said voyage, seaworthy.

VIII.

That thereafter, and more than sixty days before the commencement of this action, the said loss was adjusted, and the said plaintiff at said time furnished the said defendant with due and proper proofs of loss and of interest in said property insured.

IX.

That the said defendant then and there admitted the said loss to be a loss by a peril of the sea, and admitted the amount thereof to be eight thousand two hundred and fifty (8,250) dollars.

X.

That the plaintiff duly performed all the conditions and covenants in said contract of insurane on its part to be performed.

XI.

That thereafter said plaintiff demanded payment of the said sums so insured, of the said defendant, but the said defendant has neglected and refused to pay the same, or any part thereof, and no part of said insurance has been paid.

For a second and further cause of action against said defendant, said plaintiff alleges, that:

I.

At all the times hereinafter mentioned the said plaintiff was, and still is, a corporation, organized under the laws of the State of California, with its principal place of business at the city and county of San Francisco, State of California.

II.

That at all the times hereinafter mentioned the said defendant was, and still is, a corporation, organized under the laws of the United Kingdom of Great Britain and Ireland, with its principal place of business in Liverpool, England, and having an agency and doing business in the city and county of San Francisco, State of California.

III.

That on the 2d day of May, 1900, the said defendant issued its policy of insurance to said plaintiff, wherein and whereby the said defendant, for and in consideration of the premium of two hundred and eighty-one and twenty-five one hundredths (281.25) dollars, then and there paid to it by said plaintiff, did insure upon plaintiff's account, in case of loss to be paid to said plaintiff, certain merchandise laden or to be laden on board the

good barkentine "Catherine Sudden," for a voyage at and from San Francisco, to Cape Nome, Alaska, beginning said adventure upon said property upon and immediately following the loading thereof on board the said vessel at San Francisco, and to continue and endure until thirty days after arrival, or at ship's tackle at Cape Nome, Alaska.

Said defendant further in and by said policy of insurance agreed to and then and there did insure the said plaintiff upon said merchandise for the said voyage against perils of the sea, fire, pirates, assailing thieves, jettisons, barratry of masters or mariners, and all other losses and misfortunes that have or shall come to the hurt, damage or detriment of the said property for which insurers are liable under the rules and customs of insurance in San Francisco, excepting such losses and misfortunes as are excluded by said policy.

Said defendant further in and by said policy of insurance agreed that the said property so insured was of the value of five thousand two hundred and fifty (5,250) dollars, and that in case of loss of said merchandise by any of the perils insured against in said policy, it, the said defendant, would pay the said loss in sixty days after proof and adjustment of loss, and proof of interest in the property insured. A copy of said policy is hereto attached, marked Exhibit "A," and hereby referred to and made part hereof.

IV.

All of said merchandise in said policy insured was at the port of San Francisco laden as cargo on board said barkentine "Catherine Sudden," as in said policy pro-

vided, and the said vesel with the said merchandise on board thereof then and there set sail from San Francisco upon the voyage in said policy mentioned.

Thereafter, to wit, on the 3d day of June, 1900, and while the said vessel was proceeding upon the voyage in said policy of insurance mentioned, the said vessel and the said merchandise were sunk by a peril of the sea, and the said merchandise then and there and by reason of the said perils of the sea, became a total loss, to the damage of said plaintiff in the sum of five thousand two hundred and fifty (5,250) dollars.

That thereafter the said merchandise, by and with the consent of the agent of said defendant, was duly sold in one lot at public auction for account of whom it might concern, and the proceeds of said sale, the exact amount of which this plaintiff has been unable to ascertain, but which said plaintiff upon its information and belief alleges did not exceed the sum of five hundred dollars, has never come to the hands of this plaintiff, but was retained by the salvors of said merchandise to be applied to their claim for salvage upon the same.

V.

That at the time of the application for and making of said contract of insurance hereinbefore set forth, and thereafter and up to and including the loss of said property, the said plaintiff was the owner of said merchandise.

VI.

That the said barkentine "Catherine Sudden" at the time of the effecting of said insurance, and at the time of her departure upon said voyage, was seaworthy.

VII.

That thereafter, and more than sixty days before the commencement of this action, the said plaintiff's loss was adjusted, and the said plaintiff at said time furnished the said defendant with due and proper proofs of loss and of interest in said property insured.

VIII.

That the said defendant then and there admitted the said loss to be a loss by a peril of the sea and admitted the amount thereof to be five thousand two hundred and fifty (5,250) dollars.

IX.

That the said plaintiff duly performed all the conditions and covenant in said contract of insurance on its part to be performed.

X.

That the said plaintiff demanded payment by said defendant of the said sum so insured, but said defendant has neglected and refused to pay the same, or any part thereof, and no part of said insurance has been paid.

And as a third and further cause of action against said defendant, plaintiff alleges, that:

I.

At all the times hereinafter mentioned the said plaintiff was, and still is, a corporation, organized under the laws of the State of California, with its principal place of business at the city and county of San Franisco, in said State.

II.

That at all the times hereinafter mentioned the said defendant was, and still is, a corporation, organized under the laws of the United Kingdom of Great Britain and Ireland, with its principal place of business at Liverpool, England, and having an agency and doing busi- of business at the city and county of San Francisco, in California.

III.

That on the 2d day of May, 1900, the said defendant issued its policy of insurance to said plaintiff, wherein and whereby the said defendant for and in consideration of the premium of two hundred and eighty-one and 25-100 (281.25) dollars, then and there paid to it by said plaintiff, did insure upon plaintiff's account, in case of loss to be paid to said plaintiff, certain merchandise laden or to be laden on deck on board the good barkentine "Catherine Sudden," for a voyage at and from San Francisco to Cape Nome, Alaska, beginning said adventure upon said property upon and immediately following the loading thereof on board the said vessel at San Francisco, and to continue and endure until thirty days after arrival, or at ship's tackle, at Cape Nome, Alaska.

Said defendant further in and by said policy of insurance agreed to, and then and there did insure the said plaintiff upon said merchandise for the said voyage against perils of sea, fire, pirates, assailing thieves, jettisons, barratry of master or mariners, and all other losses and misfortunes that have or shall come to the hurt, damage or detriment of the said property, for which insurers are liable under the rules and customs

of insurance in San Francisco, excepting such losses and misfortunes as are excluded by said policy.

Said defendant further agreed in and by said policy that the said property so insured was of the value of three thousand (3,000) dollars, and that in case of loss of said merchandise by any of the perils insured against in said policy, it, the said defendant, would pay the said loss in sixty days after proof and adjustment of loss, and proof of interest in the property insured. A copy of said policy is hereto attached, marked Exhibit "A," and hereby referred to and made a part hereof.

IV.

All of said merchandise in said policy insured was at the port of San Francisco laden as cargo on board said barkentine "Catherine Sudden" as in said policy provided, and the said vessel with the said merchandise on board thereof then and there set sail from San Francisco upon the voyage in said policy mentioned.

That thereafter, to wit, on the 3d day of June, 1900, and while the said vessel was proceeding upon the voyage in said policy of insurance mentioned, the said merchandise became a total loss, by perils of the sea, to the damage of this plaintiff in the sum of three thousand (3,000) dollars.

V.

That at the time of the application for and making of said contract of insurance hereinbefore set forth, and thereafter, and up to and including the loss of said property, the said plaintiff was the owner of said merchandise.

VI.

That the said barkentine "Catherine Sudden" at the

time of the effecting of said insurance, and at the time of her departure upon said voyage, was seaworthy.

VII.

That thereafter, and more than sixty days before the commencement of this action, the said plaintiff's loss was adjusted, and the said plaintiff at said time furnished the said defendant with due and proper proofs of loss and of interest in said property insured.

VIII.

That the said defendant then and there admitted the said loss to be a loss by a peril of the sea and admitted the amount thereof to be three thousand (3,000) dollars.

IX.

That the said plaintiff duly performed all the conditions and covenants in said contract of insurance on its part to be performed.

X.

That the said plaintiff demanded payment by said defendant of the said sum so insured, but the said defendant has neglected and refused to pay the same, or any part thereof, and no part of said insurance has been paid.

And as a fourth and further cause of action against said defendant, plaintiff alleges, that:

I.

At all the times hereinafter mentioned the said plaintiff was, and still is, a corporation, organized under the laws of the State of California, with its principal place of business at the city and county of San Francisco, in said State.

II.

At all the times hereinafter mentioned the said defendant was, and still is, a corporation, organized under the laws of the United Kingdom of Great Britain and Ireland, with its principal place of business at Liverpool, England, and having an agency and doing business in the city and county of San Francisco, State of California.

III.

That on the 2d day of May, 1900, the said defendant issued its policy of insurance to said plaintiff, wherein and whereby the said defendant for and in consideration of the premium of two hundred and eighty-one and 25/100 (281.25) dollars, then and there paid to it by said plaintiff, did insure upon plaintiff's account, in case of loss to be paid to said plaintiff, certain merchandise laden or to be laden on deck on board the good barkentine "Catherine Sudden," for a voyage at and from San Francisco to Cape Nome, Alaska, beginning said adventure upon said property upon and immediately following the loading thereof on board the said vessel at San Francisco, and to continue and endure until thirty days after arrival, or at ship's tackle, at Cape Nome, Alaska.

Said defendant further in and by said policy of insurance agreed to, and then and there did insure the said plaintiff upon said merchandise for the said voyage against the perils of the sea, fire, pirates, assailing thieves, jettisons, barratry of master or mariners, and all other losses and misfortunes that have or shall come to the hurt damage, or detriment of the said property, for which insurers are liable under the rules and customs of insur-

ance in San Francisco, excepting such losses and misfortunes as are excluded by said policy.

Said defendant further agreed in and by said policy that the said property so insured was of the value of three thousand (3,000) dollars, and that in case of loss of said merchandise by any of the perils insured against in said policy, it, the said defendant, would pay the said loss in sixty days after proof and adjustment of loss, and proof of interest in the property insured. A copy of said policy is hereto attached, marked Exhibit "A," and hereby referred to and made a part hereof.

IV.

That the said defendant further in and by said policy agreed that in case of loss or misfortune resulting from any perils insured against, that said plaintiff should use all reasonable and proper means for the security, preservation, relief and recovery of the property insured, or any part thereof, to the charges whereof said defendant would contribute in proportion as the sum insured is to the whole sum at risk.

V.

All of said merchandise in said policy insured was at the port of San Francisco laden as cargo on board the said barkentine "Catherine Sudden," as in said policy provided, and the said vessel with the said merchandise on board thereof then and there set sail from San Francisco upon the voyage in said policy mentioned.

That thereafter, to wit, on the 3d day of June, 1900, and while the said vessel was proceeding upon the voyage in said policy of insurance mentioned, the said vessel was

wrecked by a peril of the sea, and it became necessary for the security, relief and recovery of said merchandise for said plaintiff to pay to the salvors thereof, and the said plaintiff then and there did pay to the said salvors, for the relief, preservation and recovery of said property, the sum of four thousand (4,000) dollars, whereby the said defendant became liable to pay to said plaintiff the said sum of four thousand ($4,000) dollars, for and on account of the matters aforesaid.

VI.

That at the time of the application for and making of said contract of insurance hereinbefore set forth, and thereafter and up to and including the loss of said property, the said plaintiff was the owner of said merchandise.

VII.

That the said barkentine "Catherine Sudden" at the time of the effecting of said insurance, and at the time of her departure upon said voyage, was seaworthy.

VIII.

That thereafter, and more than sixty days before the commencement of this action, the said plaintiff's loss was adjusted, and the said plaintiff at said time furnished the said defendant with due and proper proofs of loss and of interest in said property insured.

IX.

That the said defendant then and there admitted the said loss to be a loss by a peril of the sea.

X.

That the said plaintiff has duly performed all the con-

ditions and covenants in said contract of insurance on its part to be performed.

XI.

That the said plaintiff demanded payment by said defendant of said sum of $4,000, but the said defendant has neglected and refused to pay the same, or any part thereof, and no part of said sum has been paid.

Wherefore, plaintiff prays for judgment against said defendant for the sum of twelve thousand two hundred and fifty (12,250) dollars, together with interest and costs of suit.

NATHAN H. FRANK,
Attorney for Plaintiff.

State of California,
City and County of San Francisco. } ss

H. E. Pennell, being first duly sworn, deposes and says: That he is an officer of the plaintiff corporation, to wit, the secretary thereof; that he has read he foregoing complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and that as those matters he believes it to be true

H. E. PENNELL.

Subscribed and sworn to before me this 31st day of May 1901.

[Seal] GEO. T. KNOX,
Notary Public in and for the city and County of San Francisco, State of California.

Exhibit "A."

Local Cargo Policy.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND.

No. 26,969.

In consideration of two hundred eighty-one and 25-100 dollars, to it agreed to be paid by the insured herein named, By These Presents insures Eight Thousand Two Hundred Fifty and 00-100 Dollars, on account of Nome Beach Lighterage and Transportation Co., in case of loss to be paid to themselves lost or not lost, at and from San Francisco To Cape Nome, Alaska. Risk hereunder to cease at ship's tackle, or thirty days after arrival of vessel at destination, upon Merchandise$3,000 on deck, $5,250 under deck, laden or to be laden, on and under deck on board the good Bk. "Catherine Sudden." Beginning the adventure upon the said property or interest, from and immediately following the loading thereof, on board said vessel at San Francisco as aforesaid, and so shall continue and endure until 30 days after arrival or at ship's tackle at Cape Nome aforesaid. And it shall be lawful for the said vessel in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accident. Deck load warranted free from any claims arising from wet, breakage, leakage or exposure.

U. S. Int. Rev. Stamps, $1 cancelled.

U. S. Int. Rev. Stamp, 25 cents cancelled.

U. S. Int. Rev. Stamp, 10 cents cancelled.

U. S. Rev. Stamp. 5 cents cancelled.

U. S. Int. Rev. Stamp, 1 cent cancelled.

The Assured, in accepting this Policy, hereby binds himself or themselves according to the following agreements and stipulations:

1. Touching the adventures and perils which this Insurance Company is contented to bear, and takes upon itself in this Policy, they are of the seas, pirates, assailing thieves, jettisons, barratry of the master or mariners, and all other losses and misfortunes that have or shall come to the hurt, damage or detriment of the said property or interest, to which insurers are liable by the Rules and Customs of Insurance in San Francisco, excepting such losses and misfortunes as are excluded by this Policy. In all cases of loss, such loss to be paid in sixty days after proof and adjustment of loss, and proof of interest in the property insured, all sums due or coming due to the Company from the insured, being first deducted. In case of loss or misfortune resulting from any peril insured against, the insured hereby engages for himself, or themselves, his or their factors, servants and assigns, to sue, labor and travel, and use all reasonable and proper means for the security, preservation, relief and recovery of the property insured, or any part thereof; and also to use all proper and legal means to recover, through general average or otherwise, from the parties interested in Vessel, Freight or Cargo, either of all, any sums due the property insured or its owners, on account of sacrifices, losses or expenses incurred for the general safety or the common good; to the charges whereof this Company will contribute in proportion as the sum insured is to the whole sum at risk; nor shall the acts of the Insured or Insurers, in re-

Valuation $8,250.

covering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment.

2. The above-described property or interest hereby insured is valued at Eight Thousand Two Hundred Fifty and 00-100 Dollars. If no valuation be written herein, then the property insured is hereby valued at invoice cost on board.

Sum Insured $8250.

3. All merchandise not excepted under the following memorandum clause, is hereby warranted by the Insured Free From Particular Average and Partial Loss, unless occasioned by standing, sinking, fire, collision or other extraordinary peril hereby insured against, and amounting to fifty per cent. or more on the sound value of the whole shipment at the port of delivery, and all such loss shall be settled on the principles of salvage loss, with benefit of salvage to the Insurers. Commissions and Profits on merchandise are warranted free from partial loss and particular and general average, and insured against total loss only, and other profits and commissions are insured against total loss of vessel only.

4. Memorandum.—It is agreed that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, cutlery, hardware and all other articles subject to rust; madder, sumac, willow and wicker ware (manufactured or otherwise), salt, guano, cigars (except in tin packages), fireworks, saltpetre, grain and seeds of all kinds possessing the power of germination, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, vegetables and roots, rags, jute and hempen yarns, bags, cotton bagging and other articles used for bags or bagging,

hops, pleasure carriages, household furniture, printed books, personal effects, paintings, statuary, engravings and prints, skins and hides, musical instruments, looking glasses,————————and all other articles that are perishable in their own nature, are hereby insured only against general average and actual total loss; and the Insurers are not to be liable hereunder for any constructive total loss on such articles, if any portion thereof be delivered in specie at the port of destination.

Rate per cent 2½ and 5%

5. Warranted by the Insured free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or moldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils and amounting to a claim under the Policy, as herein provided. Also that the Insurer shall not be held liable hereunder for stains or damages to casks or other packages containing merchandise insured; neither for leakage of Molasses or other liquid, nor for breakage of Glass, Crockery, or other brittle ware unless occasioned by standing or collision with another vessel, and amounting to a claim under the Policy, as herein provided. Also, in case or loss or injury to any part of a machine, consisting when complete for sale or use, of several parts, this Company shall only be liable for the insured value of the part lost or damaged, provided, such loss or injury amount to fifty per cent. or more, on the sound value of the whole shipment at the port of delivery. In case of any claim for damage from sea perils to Dry Goods, the loss shall be ascertained by a seperation and sale at auction of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as

to all other merchandise, so far as practicable. In all cases of appraisement of damages, if the same shall have proved to constitute a claim under the Policy, then the entire expense of such appraisement will be borne by this Company, in consideration whereof, if the damage does not amount to a claim, then the Insured hereby agrees to pay the entire expense.

6. Warranted by the Insured free from loss or expense, arising from capture, seizure, detention, destruction or the consequences of any attempt thereat, by any hostile nation, or by any other officer, civil or military, or other person claiming to act in its name, or under its authority, or in its behalf. Also, warranted not to abandon in case of blockade, and free from any expense in consequence thereof; but in the event of blockade, to be at liberty to proceed to a safe port not blockaded and there end the voyage. The Insurers are also hereby warranted by the In-

Premium, $281.25

sured free from any charge, damage or loss which may arise in consequence of seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

7. It is hereby further agreed by and between the Insured and Insurers, that the provisions of the Civil Code of California shall be conclusive and binding, as regarding the warranty of seaworthiness, liability of Insurers in case of prior, subsequent or simultaneous insurance, and such other questions as are therein legislated upon and not otherwise provided for in this Policy.

8. It is furthermore hereby expressly provided and agreed that no suit or action against this Company, for the recovery of any claim upon, under or by virtue of this

Policy, shall be sustained in any Court of Law or Chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall have occurred; said period of twelve months to commence running from the time of such loss or damage, and not from the date when proofs of loss are made, or the amount of such loss or damage is ascertained, or any right of action under this Policy shall accrue; and in case any such suit or action shall be commenced against said Company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

9. If the voyage aforesaid shall have been begun and shall have been terminated before the date of this Policy, then there shall be no return of premium on account of such termination of the voyage. In all cases of return of premium, in whole or in part, ten per cent. upon the premium is to be retained by the Insurers. If there be an Agent of the Insurers located at or near any place where damages are to be ascertained, or proofs of loss taken, or a general average adjusted, said Agent must be represented upon the surveys, if any are held, and all proofs of loss and statements of average must be certified to by him as correct in accordance with the Laws and Customs of the place where they are prepared, or they will not be allowed by this Company.

In witness whereof the said The Standard Marine Insurance Company, Limited, has caused these presents to be signed by John D. Spreckels, President of J. D. Spreck-

els & Bros. Co., (a corporation), its duly authorized agents, but the same shall not be binding unless countersigned by J. B. F. DAVIS & SON, Managers, at San Francisco.

J. D. SPRECKELS & BROS. CO.
JOHN D. SPRECKELS,
President.

Countersigned at San Francisco, this 2nd day of May, 1900.

J. B. F. DAVIS & SON,
Managers.

[Endorsed]: Local Policy. The Standard Marine Insurance Co., Limited, of Liverpool, England. San Francisco, April 27th, 1900. Ship, Bk. "Cathrine Sudden." Voyage, S. F. to Cape Nome. On Mdse. $8,250 @ 2½ and 5% per cent. Premium, $281.25. Notice.—The Insured are particularly requested to read their Policies. No. 26,-969. J. D. Spreckels & Bros. Co., Agents, J. B. F, Davis & Son, Managers, San Francisco, Cal.

[Endorsed]: Complaint. Filed May 31, 1901, Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),

Plaintiff,

vs.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND (a Corporation),

Defendant.

No. 13,097.

Answer.

Answering unto the complaint of plaintiff, defendant admits the corporate existence of plaintiff and defendant, the issuance of the policy mentioned in the complaint and the insurance thereby, as alleged in the complaint, of the merchandise therein described upon the vessel therein named for the voyage therein stated; but defendant denies that on the 3d day of June, 1900, and while said vessel was proceeding upon said voyage, or at any time, or at all, the whole of said merchandise was totally, or otherwise, lost by perils of sea, to the damage of plaintiff in the sum of eight thousand two hundred and fifty (8,250) dollars, or in any other sum, or that, except as hereinafter in this answer set forth, any part of said merchandise was lost, to the damage of plaintiff in any sum.

And defendant denies that the merchandise under deck, by and with, or by, or with, the consent of an agent of defendant, was duly, or otherwise, sold in one lot, or otherwise, at public auction, or otherwise, for whom it might concern, or otherwise. Defendant admits that said merchandise was sold at auction, but as to the averments of the complaint that the amount of said sale did not exceed five hundred (500) dollars, and that the proceeds of said sale have never come to the hands or into the possession of plaintiff, but were retained by the salvors of said merchandise, to be applied to their claim for salvage upon the same, defendant says that it has no information or belief sufficient to enable it to answer said averments, and upon that ground denies that the amount of said sale did not exceed five hundred (500) dollars, and denies that the proceeds of said sale were retained by the salvors of said merchandise, to be applied to their claim for salvage upon the same.

And defendant denies that at any time plaintiff's loss upon said property was adjusted, or that plaintiff has at any time furnished defendant with due and proper, or due, or proper, proofs of loss and of interest in said insured property, or with due and proper, or due, or proper, proofs of loss, or due and proper, or due, or proper, proof of interest in said property.

And defendant denies that defendant at any time admitted plaintiff's loss upon said property to be a loss by peril of the sea, or that the amount thereof was eight thousand two hundred and fifty (8,250) dollars, or any other sum.

And defendant denies that the plaintiff duly, or other-

wise, performed all the conditions and covenants, or conditions, or covenants, in said contract of insurance on its part to be performed, and defendant specifies the following particulars in which plaintiff failed to keep and perform the conditions and covenants of said contract of insurance upon its part to be kept and performed. In this behalf defendant alleges:

1. That the said vessel, the "Catherine Sudden," sailed upon the voyage mentioned in the complaint from San Francisco, California, bound for Nome, Alaska, and while proceeding upon said voyage, and on or about the 28th day of May, 1900, passing through and out of Umalak Pass into Behring Sea, met drift ice, and within twenty-four hours thereafter met with large fields of ice, and within forty-eight hours thereafter ran into and was surrounded with heavy ice, and thereafter and on or about the 3d day of June, 1900, the said vessel was struck by ice on her port bow and said bow was thereby stove in. That by reason of this injury to said vessel she was so crippled that she was compelled to seek and obtain assistance from other vessels which were then and there in her immediate vicinity. That the property insured by defendant then and there on board said "Catherine Sudden" consisted in miscellaneous merchandise stowed under deck and a lighterage plant, consisting of a launch, scow and surf boat, or boats, loaded upon the deck of said "Catherine Sudden." In the vicinity of said "Catherine Sudden" at said time were the sailing vessels "Pitcairn" and "Rube Richardson," and the steamer "Corwin," the said "Corwin," belonging as defendant is informed and believes, to the Corwin Trading Company. Defendant is informed and

believes, and upon such information and belief alleges, that considerable portions of said insured merchandise stowed below deck were taken from said "Catherine Sudden" upon board the said vessels "Pitcairn," "Rube Richardson" and "Corwin." That plaintiff then and there arranged with the captain commanding the "Corwin" to tow said "Catherine Sudden" and said launch, scow, and surf boat, or boats, into Nome, Alaska, and then and there agreed to pay as salvage for so towing said launch, scow, and surf boat, or boats, the sum of twenty-five hundred (2500) dollars, whereupon said "Corwin"did so tow said launch, scow and surf boat, or boats, and said "Catherine Sudden," with so much of said insured cargo thereon as had not been taken from her as hereinabove alleged, into said Nome, Alaska. Defendant is informed and believes, and upon such information and belief alleges, that plaintiff sailed the said "Catherine Sudden" into said ice, knowing full well that so to do endangered the safety of said vessel, and that so to do was not consistent with good seamanship or with due and proper care, and that plaintiff, when ice was encountered, in the exercise of proper care should have changed the course of said vessel and have sought open water or port of safety until danger from ice between San Francisco and Nome had passed.

2. That upon the arrival of said "Catherine Sudden" and said launch, scow and surf boat, or boats, at Nome in tow of the "Corwin," said launch, scow and surf boat, or boats, were delivered to plaintiff and, upon the suggestion of the agent of the plaintiff at Nome, a survey was held upon said vessel and cargo, which resulted in the condemnation of said vessel and cargo, and a recommenda-

tion that they be sold, whereupon said vessel and cargo were sold at public auction; that the sale of said cargo was by manifest lots, without inspection, or opportunity to inspect, by the purchaser thereof; that the defendant is informed and believes, and upon such information and belief alleges, that upon said sale the merchandise upon said "Catherine Sudden" loaded below deck and insured by plaintiff was sold for five hundred and thirty (530) dollars, and defendant is informed and believes, and upon such information and belief alleges, that said merchandise, at the time of said sale, was of a value greatly in excess of the price at which it was sold, And defendant further alleges, that with said lighterage plant so as aforesaid delivered to said plaintiff, said insured merchandise could have been landed at Nome; that plaintiff did not in any way seek to arrange with said Corwin Company or with any of its officers, agents or servants, for the landing or delivery to plaintiff of said insured merchandise, or any part thereof, nor to secure from said Corwin Company, or any of its officers, agents or servants nor from said vessels, "Pitcairn" or "Rube Richardson," the return or delivery to plaintiff of any of the insured merchandise taken from said "Catherine Sudden" as here in alleged, nor for compensation therefor, and did not in any way seek, and has not in any way sought, to arrange or agree with said Corwin Company, or any of its officers, agents, or servants, for the amount to be allowed or paid to said Corwin Company by way of salvage for said insured merchandise, and did not in any way seek, by purchase of said insured merchandise at said auction sale, or otherwise, or at all, to recover said insured mer-

chandise, or otherwise to reduce the loss to plaintiff or to this defendant, and defendant is informed and believes, and upon such information and belief alleges, that had the plaintiff sought to secure the delivery to it of said insured merchandise, or had bid in said merchandise as said auction sale, it could and would have greatly lessened the loss to plaintiff upon said merchandise; that upon the arrival of said "Catherine Sudden" at Nome the weather was calm, and said insured merchandise could have been safely landed and delivered to plaintiff, and defendant is informed and believes, and upon such information and belief alleges, that said merchandise would have been delivered to plaintiff if plaintiff had sought to secure delivery thereof.

And further answering unto the complaint, defendant denies that the said vessel, the "Catherine Sudden," and the merchandise, valued in the policy herein sued upon at five thousand two hundred and fifty (5,250) dollars, or either, was, on the 3d day of June 1900, and while said vessel was proceeding upon the voyage in the complaint mentioned, or at any time, or at all, sunk by a peril of the sea, or that said merchandise then and there, or then, by reason of perils of the sea, or otherwise, became a total loss, or a loss, to the damage of plaintiff in the sum of five thousand two hundred and fifty (5,250) dollars, or any other sum, or that, except as in this answer set forth, any part of said merchandise was lost, to the damage of plaintiff in any sum.

And defendant denies that said merchandise, by and with, or by, or with, the consent of an agent of defendant, was duly, or otherwise, sold in one lot, or otherwise, at

public auction, or otherwise, for whom it might concern, or otherwise. Defendant admits that said merchandise was sold at auction, but as to the averments of the complaint that the amount of said sale did not exceed five hundred (500) dollars, and that the proceeds of said sale have never come to the hands or into the possession of plaintiff, but were retained by the salvors of said merchandise, to be applied to their claim for salvage upon the same, defendant says that it has no information or belief sufficient to enable it to answer said averments, and upon that ground denies that the amount of said sale did not exceed five hundred (500) dollars, and denies that the proceeds of said sale were retained by the salvors of said merchandise, to be applied to their claim for salvage upon the same.

And defendant denies that at any time plaintiff's loss upon said property was adjusted, or that plaintiff at any time furnished defendant with due and proper, or due, or proper, proofs of loss, or of interest in said property.

And defendant denies that defendant at any time admitted plaintiff's loss upon said property to be a loss by a peril of the sea, or that the amount thereof was five thousand two hundred and fifty (5,250) dollars, or any other sum.

And further answering unto the complaint, defendant denies that on the 3d day of June 1900, and while said vessel, the "Catherine Sudden," was proceeding upon the voyage in the complaint mentioned, the merchandise, valued in the policy herein sued upon at three thousand (3,000) dollars, became a total loss by perils of the sea, to the damage of plaintiff in the sum of three thousand

(3,000) dollars, or in any sum greater than twenty-five hundred (2,500) dollars. In this behalf defendant alleges that the said property valued in said policy at three thousand (3,000) dollars was the launch, scow and surf boat, or boats, hereinbefore in this answer referred to, and that said launch, scow and surf boat, or boats, were at Nome, Alaska, delivered to plaintiff by the salvors thereof upon the payment by plaintiff to said salvors of twenty-five hundred (2,500) dollars. Defendant further alleges that it is informed and believes, and upon such information and belief alleges, that said launch, scow and surf boat or, boats, were at all times of a value greatly in excess of said sum of three thousand (3,000) dollars, and were at all times by plaintiff known to be of a value greatly in excess of three thousand (3,000) dollars.

And defendant denies that at any time plaintiff's loss upon said property was adjusted, or that plaintiff at any time furnished defendant with due and proper, or due or proper, proofs of loss of, or interest in, said insured property.

And defendant denies that defendant at any time admitted its loss upon said property to be a loss by a peril of the sea, or that the amount thereof was three thousand (3,000) dollars or any other sum.

And further answering unto the complaint of plaintiff, defendant denies that on the 3d day of June 1900, and while said vessel, the "Catherine Sudden," was proceeding upon the voyage in the complaint mentioned, or at any other time, it became necessary, for the security, relief and recovery, or security, relief or recovery, of the merchandise laden on the deck of said vessel, to pay to

salvors thereof, or that plaintiff did at any time pay to the salvors of said property, for the relief, preservation and recovery, or relief, preservation, or recovery of said property, the sum of four thousand (4,000) dollars, or any sum in excess of twenty-five hundred (2,500) dollars. And defendant denies that defendant became liable to pay to plaintiff, for the relief, preservation and recovery, or relief, preservation or recovery of said property, the said sum of four thousand (4,000) dollars, or any other or greater sum than such proportion of twenty-five hundred (2,500) dollars as the insurance written by defendant upon said merchandise laden upon the deck of said vessel bore to the value of said property so laden.

And defendant denies that at any time plaintiff's said alleged loss was adjusted, or that defendant at any time admitted any loss suffered by plaintiff to be a loss by a peril of the sea.

Defendant admits that plaintiff has heretofore demanded of defendant the payment of eight thousand two hunderd and fifty (8,250) dollars as payment for its alleged loss upon the merchandise described in the policy of insurance annexed to plaintiff's complaint, and admits that defendant has refused to pay the same, but defendant denies that it has neglected to pay said loss, or any part thereof, and denies that plaintiff has ever demanded of defendant payment of the sum of four thousand (4,000) dollars for or because of any payment made by plaintiff to the salvors of said merchadise so laden upon said vessel, or any part thereof.

And further answering unto the complaint, defendant denies that the said vessel "Catherine Sudden" was, at

the time of effecting the insurance in the complaint alleged, or at the time of her departure upon the voyage in the complaint alleged, seaworthy. In this behalf defendant alleges that in making the voyage mentioned in the complaint, at and during the time said voyage was undertaken, it was to be anticipated that ice might be encountered in said Behring Sea, and defendant is informed and believes, and upon such information and belief alleges, that said vessel was of insufficient strength to be sailed in said sea under said circumstances.

II.

And further answering unto the complaint of plaintiff defendant alleges,

1. That the policy of insurance attached to the complaint herein was issued as in the complaint alleged.

2. That the vessel named in said policy of insurance, and upon which was laden the merchandise therein and thereby insured, was owned by the plaintiff, and was by the plaintiff despatched upon the voyage in the policy mentioned, to wit, a voyage from San Francisco, California, to Nome, Alaska.

3. That the said vessel with its said insured cargo on board sailed from San Francisco, California, bound for Nome, Alaska, and while proceeding upon said voyage, and on or about the 28th day of May 1900, passing through and out of Umalak Pass into Behring Sea, met drift ice, and within twenty-four hours thereafter met with large fields of ice, and within forty-eight hours thereafter ran into and was surrounded with heavy ice, and thereafter and on or about the 3d day of June, 1900, said vessel was struck by ice on her port bow and said bow was thereby

stove in. That by reason of this injury to said vessel she was so crippled that she was compelled to seek and obtain assistance from other vessels which were then and there in her immediate vicinity.

4. That the property insured by defendant, then and there on board said "Catherine Sudden," consisted of miscellaneous merchandise stowed under deck and a lighterage plant, consisting of a launch, scow and surf boat, or boats, loaded upon the deck of said "Catherine Sudden." In the vicinity of said "Catherine Sudden" at said time were the sailing vessels "Pitcairn" and "Rube Richardson" and the steamer "Corwin," the said "Corwin" belonging, as defendant is informed and believes, to the Corwin Trading Company. Defendant is informed and believes, and upon such information and belief alleges, that considerable portions of said insured merchandise stowed below deck were taken from said "Catherine Sudden" upon board said vessels "Pitcairn," "Rube Richardson" and "Corwin." That plaintiff then and there arranged with the captain commanding the "Corwin" to tow said "Catherine Sudden" and said launch, scow and surf boat, or boats, into Nome, Alaska, and then and there agreed to pay as salvage for towing said launch, scow and surf-boat, or boats, the sum of twenty-five hundred (2,500) dollars, whereupon said "Corwin" did so tow said launch, scow and surf-boat, or boats, and said "Catherine Sudden," with so much of said insured cargo thereon as had not been taken from here as hereinbefore alleged, into said Nome, Alaska.

5. Defendant is informed and believes, and upon such information and belief alleges, that plaintiff sailed the

said "Catherine Sudden" into said ice, knowing full well that so to do endangered the safety of said vessel, and that so to do was not consistent with good seamanship or with due and proper care, and that plaintiff, when ice was encountered, in the exercise of proper care should have changed the course of said vessel and have sought open water or a port of safety until danger from ice between San Francisco and Nome had passed.

6. That upon the arrival of said "Catherine Sudden" and said launch, scow and surf-boat, or boats, at Nome, in tow of the "Corwin," said launch, scow and surf-boat, or boats, were delivered to plaintiff, and, upon the suggestion of the agent of plaintiff at Nome, a survey was held upon said vessel and cargo, which resulted in the condemnation of said vessel and cargo and a recommendation that they be sold, whereupon said vessel and cargo were sold at public auction; that the sale of said cargo was by manifest lots, without inspection, or opportunity to inspect, by the purchasers thereof; that defendant is informed and believes, and upon such information and belief alleges, that upon said sale the merchandise upon said "Catherine Sudden" loaded below deck and insured by plaintiff was sold for five hundred and thirty (530) dollars, and defendant is informed and believes, and upon such information and belief alleges, that said merchandise, at the time of said sale, was of a value greatly in excess of the price at which it was sold, and defendant further alleges that with said lighterage plant, so as aforesaid delivered to said plaintiff said insured merchandise could have been landed at Nome; that plaintiff did not in any way seek to arrange with said Corwin Com-

pany, or with any of its officers, agents or servants, for the landing or delivery to plaintiff of said insured merchandise, or any part thereof, nor to secure from said Corwin Company, or any of its officers, agents or servants, nor from said "Pitcairn" or Rube Richardson," the return or delivery to plaintiff of any of the insured merchandise taken from said "Catherine Sudden" as herein alleged, nor for compensation therefor, and did not in any way seek, and has not in any way sought, to arrange or agree with said Corwin Company, or with any of its officers, agents or servants, for the amount to be allowed or paid to said Corwin Company by way of salvage for said insured merchandise, and did not in any way seek, by purchase of said insured merchandise at said auction sale, or otherwise, or at all, to recover said insured merchandise, or otherwise to reduce the loss to plaintiff or to this defendant. And defendant is informed and believes, and upon such information and belief alleges, that had the plaintiff sought to secure the delivery to it of said insured merchandise, or had bid in said merchandise at said auction sale, it could and would have greatly lessened the loss to plaintiff upon said merchandise; that upon the arrival of said "Catherine Sudden" at Nome the weather was calm, and said insured merchandise could have been safely landed and delivered to plaintiff, and defendant is informed and believes, and upon such information and belief alleges, that said merchandise would have been delivered to plaintiff if plaintiff had sought to secure delivery thereof.

Wherefore defendant prays that plaintiff take nothing in this action, and that defendant have judgment for its costs.

VAN NESS & REDMAN,
Attorneys for Defendant.

State of California,
City and County of San Francisco. } ss.

W. S. Davis, being duly sworn, deposes and says: that J. B. F. Davis & Son are the general managers of the defendant in and for the State of California, and that affiant is a member of said firm and one of said general managers; that affiant has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information or belief, and that as to those matters he believes it to be true.

W. S. DAVIS.

Subscribed and sworn to before me this 26th day of July, 1901.

[Seal] FRANK L. OWEN.
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Service of the within Answer admitted this 27th day of July A. D. 1901. Nathan H. Frank, Attorney for Plaintiff. Filed July 29th, 1901, Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),

Plaintiff,

vs.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, of Liverpool, England (a Corporation),

Defendant.

Amendment to Complaint.

By leave of Court first had and obtained, plaintiff amends its complaint on file in the above-entitled action, as follows:

By inserting on the line before the last paragraph IV, on page 3, after the word "sea," the following: "and other dangers in said policy insured against."

By inserting on line 18 of page 6, after the words, "perils of the sea," the following: "and other dangers in said policy insured against."

By inserting on line 20 of page 9, after the words "perils of the sea," the following: "and other dangers in said policy insured against."

By inserting on line 20 of page 12, after the words, "perils of the sea," the following: "and other dangers in said policy insured against."

NATHAN H. FRANK,
Attorney for Plaintiff.

Stipulation as to Amendment to Complaint.

It is hereby stipulated that the foregoing amendment may be filed in the said action, and that verification thereof is hereby waived—

It is further stipulated and agreed, that the denials in the said original answer concerning the loss of said goods and merchandise by perils of the sea, shall be deemed to include and apply to the foregoing amendment with the same force and effect as the said denials now apply to the said allegation that said merchandise was lost by perils of the sea.

Dated, April 9th, 1902.

VAN NESS & REDMAN,
Attorneys for Defendant.
NATHAN H. FRANK,
Attorney for Plaintiff.

[Endorsed]: Filed April 17, 1902. Southard Hoffman, Clerk.

In the Circuit Court of the United States, for the Northern District of California.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),
Plaintiff,
vs.
STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND (a Corporation),
Defendant.
No. 13,097.

Verdict.

We, the jury, find in favor of the plaintiff, and assess the damages at the sum of $9194.84/100.

W. S. MILLER,
Foreman.

[Endorsed]: Filed December 19, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, for the Northern District of California.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),

Plaintiff,

vs.

STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND (a Corporation),

Defendant.

No. 13,097.

Judgment.

This cause having come on regularly for trial upon the 8th of December, 1902, before the Court and a jury of twelve men duly impaneled, Nathan H. Frank, Esq., appearing as attorney for the plaintiff, and T. C. Van Ness, Esq., appearing as attorney for the defendant, and the trial having been proceeded with upon the 8th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 18th and 19th days of December, 1902, being in the November 1902 term of said court, and evidence, oral and documentary having been introduced upon behalf of the respective parties, and the evidence having been closed, and the cause having been argued to the jury by the attorneys for the respective parties, and the Court having delivered its instructions to

the jury, and the jury, having, after due deliberation, returned the following verdict, which was recorded, viz: "We, the jury, find in favor of the plaintiff, and assess "the damages at the sum of $9194.84/100"; and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs:

Now, therefore by virtue of the law, and by reason of the premises aforesaid, it is considered by the Court that Nome Beach Lighterage and Transportation Company, plaintiff herein, do have and recover of and from The Standard Marine Insurance Company, Limited, of Liverpool, England, a corporation, defendant herein, the sum of nine thousand, one hundred and ninety-four and 84/100 dollars, together with its costs in this behalf expended, taxed at $106.10.

Judgment entered December 19, 1902.

SOUTHARD HOFFMAN,
Clerk.

A true copy—attest:

[Seal] SOUTHARD HOFFMAN,
Clerk.

By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Filed December 19, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

NOME BEACH LIGHTERAGE and TRANSPORTATION COMPANY,
vs.
STANDARD MARINE INSURANCE COMPANY, LIMITED, etc.

Certificate to Judgment-Roll.

I, Southard Hoffman, clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court, this 19th day of December, 1902.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

[Endorsed: Judgment-roll. Filed December 19, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),

Plaintiff,

vs.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND (a Corporation),

Defendant.

No. 13,097.

Defendant's Bill of Exceptions.

Be it remembered: That this cause came on for trial on the 8th day of December, 1902, before the Court sitting with a jury; Nathan H. Frank, Esq., appearing for the plaintiff, and Messrs. Van Ness & Redman appearing for the defendant; whereupon the following testimony was taken and proceedings had, and a jury having been impaneled, the attorneys for the plaintiff and defendant, respectively, made their opening statements. That the attorney for the defendant then and there made the following statement:

"One of the points that will be submitted to you in this case is, whether or not this plaintiff sent, under the circumstances, at that season of the year and at that time, a seaworthy vessel upon that voyage. There is no question but what she was seaworthy so far as open

water is concerned, but whether or not sending that vessel up with Captain Panno, who was in charge of her, under instructions to get into Nome at the opening of the season, they did not knowingly send a vessel that was incompetent to go through the ice under those circumstances simply to her death if she went in the ice. That proposition involves a technical defense on the question of seaworthiness, and his Honor will instruct you in that regard. That is not our principal defense, but that is one of them. Whatever the fact might be about the "Sudden's" seaworthiness in open water, or in an ordinary sea, we are not claiming that she was unseaworthy in those particulars. Our claim is that she was not a ship that was fit to be put into the floating ice of Behring Sea at that season of the year. * * * That is all the claim we make."

The plaintiff then offered and read in evidence the policy of insurance. It was admitted by counsel for defendant that the policy as used was written; that it is a fact that it is admitted by the answer that the policy was executed, and that the goods mentioned were shipped on board for the voyage in the complaint mentioned. The defendant further admitted the corporate existence of the plaintiff, the issuance of the policy as alleged in the complaint, the insurance thereby of the goods mentioned in the complaint of the merchandise therein described, on the vessel therein named, for the voyage therein stated.

Plaintiff offered in evidence, and read, the deposition of John L. Panno, upon the taking of which deposition said Panno testified as follows:

My name is John Lewis Panno; my age; 67; am a seafaring man. I was captain in command of the "Catherine Sudden" on trip from San Francisco to Nome, Alaska, in the spring of 1900. Left San Francisco April 28th, 1900. The "Catherine Sudden" was dispatched to Nome by the Nome Beach Lighterage and Transportation Company. I considered the "Catherine Sudden" a strongly built vessel for the Behring Sea trip. Whalers are specially constructed for that purpose. Some vessels so constructed differ from vessels not so built, some in one thing and some in another. Some use iron, and some use hard wood for sheathing on the bow, so that the ice won't go through, so it cannot cut into the main planking.

Q. Where was the "Catherine Sudden" deficient, if deficient at all, in those particulars?

A. I do not think she was deficient anywhere.

Q. I understood you to say that whaling vessels and cutters are built for that kind of a voyage, and this vessel was not; did I understand you correctly?

A. What I had reference to was, that they were built to go into that ice, buck it and go through it at any time. There are a good many of them lay up there during the winter.

Q. In what respect did the "Catherine Sudden" differ in her construction as compared with those vessels that you refer to?

A. From some of those vessels she did not differ at all; some are not sheathed for it. * * * By being sheathed I mean a piece of wood put on the bow, so they

(Deposition of John L. Panno.)

can hit a piece of ice. Some of the vessels are so built. The "Catherine Sudden" was not so built.

Q. Did she have any iron in her construction, so as to withstand the effect of the ice?

A. Yes, sir, she had all she needed.

The witness continuing testified: The "Catherine Sudden" had iron up and down her stem. I had no orders from the owners of the vessel in relation to the time that I was to make on that trip in going from here there. I was master of the vessel, and was to do what I thought best. I had no directions from the owners in regard to putting in at any port on the way up before to the Behring Sea. In going from San Francisco to Nome on that particular trip I had no instructions or directions from any officer or agent of the Nome Beach Lighterage and Transportaion Company, as to whether or not I should put into Dutch Harbr on the trip. I do not remember when I entered the Behring Sea on that voyage, but I think it was about the 28th—I cannot tell, exactly.

Q. Was it in April, or May, that you got there?

A. It was not April. * * * I do not remember the date.

The witness continuing testified: Whatever the date was on which I encountered ice in the Behring Sea, it was about 5 o'clock in the afternoon. It was a clear day, all open space, all clear. The ice was down on the lee beam, about five miles away. When I first sighted the ice, I presume I might have put about, if I desired, and have gone to Dutch Harbor. As a matter of seamanship I could have done it, because I could have

(Deposition of John L. Panno.)

come back to San Francisco if I so desired. I was eight days in the ice before I was taken out of the ice and to Nome. There was in the ice, at the same time, the steamer "Portland." There were two steamers laid right alongside of us that night, before we got away the next morning, brigs and schooners, and on going aloft I could see thirty vessels right around me. The steamer "Portland," the brig "Pitcairn," and the schooner "Rube Richardson" communicated with us. Our cargo was a general cargo, but consisted principally of coal, lumber and machinery, and some general stores. I do not know how much coal we had on board. We had approximately two hundred tons of coal on board. I did not know who owned the coal; did not know anything about the cargo at all. The steamer "Corwin" took coal out of the "Sudden" either while we were in the ice or on the way to Nome. I cannot tell how much.

Q. How is it, being there at the time, you do not know what the "Corwin" took out of your vessel?

A. If you were on board a ship, and had only a place as big as that to stand on, about two by four, and the vessel going down, if you did not know but what she would be going down any minute, what would you know about anything going on?

The witness continuing testified: The "Rube Richardson" people also took something out of the "Sudden," some flour, and some bread, that would have been spoiled. I told them to take it out and take it up to Nome, and if there was any salvage to pay on it we would pay it. I never heard of it afterwards. I made

(Deposition of John L. Panno.)

efforts to get it back afterwards, when I got to Nome. I went to the vessel afterwards, when we got to Nome.

Q. And what trouble did you have about the matter?

A. They just took it, and said it belonged to them.

Q. Did you make any effort, after you got up there, to get from the "Corwin" any compensation for the coal and stuff they had taken?

A. Well, I don't know what I might say about that. When I got to Nome, the "Corwin" people took charge of the vessel. I went there a dozen times after we got in, and they said they owned the vessel and cargo, and I had no right to anything.

Q. Did you make any further effort to collect from them the value of the stuff they had taken?

A. I suggested to them that they should deposit that money in some bank, or something, there, to the credit of the vessel, but they said that everything belonged to them and they kept the whole thing. I did not make any further effort than that to get the value of the stuff they had taken. I was towed from the place where we were packed in the ice to Nome by the "Corwin." The condition of the vessel at that time was, that her stem was out, and her mast was gone, and her upper decks were all cut to pieces and she was all to pieces anyhow by the "Corwin's" people getting the stuff out from between decks as fast as they could, to get her up; they cut down everything. The "Sudden" cast her anchor about two miles from the beach.

Q. Was that the usual place for anchoring?

A. We anchored her pretty well off, not knowing ex-

(Deposition of John L. Panno.)

actly how the beach was. It was none to far off. When I got there I was to report to Captain Morine. I found him and reported to him. I found him sick. I went to him, presuming he was agent up there. I got that idea from the people who owned the vessel here, who sent me up there. He said to do the best I could with the vessel. I do not know whether Capt. Humphrey acted for the Nome Beach Lighterage and Transportation Company in relation to the "Catherine Sudden." All I know is that Captain Humphrey paid $2,500 for lighters and then he took the lighters for security and done his own work with them. I do not know whether or not Captain Humphrey took any of the cargo out of the "Sudden" and towed it ashore with the launch and lighters that had gone up on the "Sudden," because, when I got there in Cape Nome, I had no way to find that out. I was turned out of the ship by Captain Tuttle, of the "Bear," you might say. The "Corwin" people posted up a card on a piece of the mainmast that I was no longer master of it. They did it through Captain Tuttle, of the "Bear," he gave over the ship to them. The whole of the cargo of the "Sudden" was taken ont of her during the time I was there. The cargo was gotten out of the "Sudden" by lighters. I think everything was out of her but a little coal. I do not know what launch or launches, or tug or tugs, were used in the work of getting the stuff to shore, but I think Captain Humphrey had ours for a spell, and had one of his own. I mean the "Dorothy," the one that belonged to the ship that he towed in there. I saw Captain Humphrey use the "Dorothy" in getting

(Deposition of John L. Panno.)

the things from the "Sudden" and from the "Sudden" to the beach.

Q. How do you know that in addition to the "Dorothy" he used the other tug?

A. I saw them all. I do not know how long it took Captain Humphrey to discharge the "Sudden" and get her cargo from the ship to the shore.

Q. About how long?

A. Well, I will put it down three weeks.

The witness continuing testified: I remember the fact that there was a sale held on shore of the cargo of the "Sudden." Everything was sold aboard the ship. The auction was ashore, and everything was sold by the bills of lading. None of the cargo had been taken out by Captain Humphrey before that sale. Between the time the "Sudden" arrived in Nome and the time of the sale, the "Dorothy" discharged the "Corwin" according to my contract. By my contract I mean this written paper that Mr. Frank says he has, this written agreement. I had no other contract with the "Corwin," except what was put into this writing. Captain Simmie had charge of the "Dorothy" during the time she was unloading the "Corwin." Captain Simmie went up from here on the "Sudden" with me. While I was at Nome it was smooth water. It was good weather until I left. I stayed in Nome from June 10th until July 28th. I had had experience in going through the ice before, off Cape Horn, but never any Behring Sea ice. I do not know by whom the goods sold at Nome were purchased, nor who bought the coal that was sold, nor the lumber. The price of

(Deposition of John L. Panno.)

coal, when I got to Nome, was $100 per ton. The price of lumber was all the way from $100 to $160 per thousand feet, $160 a thousand for clear boards for building boats. The kind of lumber that came out of the "Sudden," having been through salt water, and lying on the beach, I do not suppose it was worth over $25 a thousand. It was pine lumber. Some of it was black with coal dust but how much I don't know. There were some case goods on board, and some barrels of liquor, and some hardware. I did not observe the condition of these goods after they were landed on the beach. I do not know what became of the case goods. I stopped aboard the "Catherine Sudden" until I was turned out of her. That was about a week. During that week nothing was done toward unloading her.

Upon cross-examination the witness testified: In my opinion, the "Catherine Sudden" was seaworthy for a voyage from San Francisco to Nome at that season of the year. The sheathing upon the vessels I have spoken about going into Behring Sea was for the purpose of bucking the ice. Vessels are not sheathed to go into the Behring Sea, but for the purpose of going into the Arctic Ocean. By bucking the ice I mean, that they ram it, and work their way through it. There was no occasion, on that voyage from San Francisco to Nome to buck the ice. At the time I got into the ice, some came together a little. There would be cakes of ice all through it.

Q. There would be cakes of ice, but there was a clear channel?

(Deposition of John L. Panno.)

A. It would be just like a street here.

Q. Perfectly navigable? A. Yes, sir.

Q. And all the other vessels went through there with perfect safety? A. Yes, sir.

Q. What was the peculiar nature of the accident that happened to you that wrecked your vessel, and which the others escaped?

A. Well, I was coming down one of those leads all right, and I got down, and there was a cake of ice here, you might say, and one here and I calculated going down through there all right. This cake here gave a slough, I suppose the tide caught it, and it hit the bow, and it turned over like that. (Showing.) We were going along in perfect safety, and a cake of ice suddenly was thrown across our bow, was projected underneath the water, and struck us underneath the water. It did not come near us on top of the water. I really struck a submerged cake of ice. If the ice had been square, the same as it ought to have been, I never would have hit it. It had a projected point underneath, and that struck me. By the looks of things, that was blue ice; it looked more like fresh water ice. If it had not been for that, I would have sailed through perfectly safely. About thirty vessels sailed through there at the same time I did. I could see thirty from aloft, all around us. Most of them were sailing vessels. There were four or five steamers, after this cake of ice struck us. The vessel came submerged to the upper deck. There remained above water about five or ten feet aft. I will say, about ninety per cent of her was under water. If it

(Deposition of John L. Panno.)

had not been for the empty water casks we had, she would have sunk entirely. That was the condition when the "Corwin" took charge of her. The flour and bread taken by the "Pitcairn" and the "Rube Richardson" would have perished if they had not taken it off. I told them to take it, and I said: "If you get into Nome, whatever salvage is on it we will pay it." When I went to Cape Nome, I went and demanded it, but could not get it. There was not any court there, or any means which could compel them to give it up. We were at the mercy of everybody when we got there. We had no specific agreement at all with the "Corwin" in regard to the salvage they were to have for saving the "Sudden" and her cargo, but had an agreement in reference to the saving of the "Dorothy" and the launches, and that agreement was in writing. After they towed her into Nome, I made as many as a dozen applications to them, with a view of getting possession of the ship and cargo, but each time they refused. They claimed they had the entire control and right to it, and the right to sell it. I did not have any means to prevent them from doing it. There were no court there that I could apply to.

Q. Did you apply to Captain Tuttle, of the "Bear," to help you to prevent the salvors from keeping the vessel?

A. No, sir, personally I did not.

Q. Did you through somebody? A. Yes, sir.

The witness continuing testified: I sent Captain Humphrey to Captain Tuttle. I did not succeed in getting any aid in that direction. He gave it all to the "Corwin." During the week I was on board, and before the

(Deposition of John L. Panno.)

"Corwin" people turned me out of the vessel, I did not have at my command any means to discharge that cargo. If I had had the means to discharge it, they would not let me do it. The cargo was a general cargo—a large number of different shippers. I do not know to whom the coal on the "Sudden" belonged, or whether part, or any, of it belonged to the plaintiff. With reference to the coal taken off the ship by the "Corwin," I do not know whether it belonged to plaintiff or to some one else, and don't know what they did with it, or where it went. I I saw some on the "Corwin"; I don't know how much. I saw some on the decks of the "Corwin"; how much, I could not tell; ten tons, I would say. I did not buy or sell any coal or lumber when I got to Nome. If I sold a ton or two when I got there, I would have got one hundred dollars for it. I don't know if that is all I could have sold. There were different prices as different vessels came in. I do not think I could have sold 200 tons at that price; this was an offer I had for a ton or two. Before the sale at auction the price of coal and everything else had dropped; the bottom dropped out of it. All the vessels came in, and the bottom dropped out of the market. This price of one hundred dollars a ton has reference to only a ton or two, and before the auction sale. I sold some lumber for some parties up there after I came ashore, after the auction sale. It was not lumber off the "Corwin." It was different lumber. It was unsubmerged lumber. I do not pretend to say that the lumber that came out of the "Sudden" had any such value. There was no peculiarity in the navigation of the

(Deposition of John L. Panno.)

Behring Sea upon this voyage, differing from the navigation on any other voyages that I have been on, and my experience in other parts of the world rendered me capable and fit for navigation through the ice at the Behring Sea. If the "Corwin" people had not come along and rescued her as she did, I presume that she would have soon went to the bottom. I was prepared to abandon the "Sudden." I had no means to save her. I did all I could to save her. As far as I was concerned, she was a goner. Captain Humphrey took the "Dorothy" and the launches, and held them as security for his loan of $2,500. By security for his loan I mean, he paid the coin, the $2,500 for salvage and held the launches for the repayment of the $2,500 to him, and collected all the towage bills, and used the tugs in his own business. He first employed them to take the cargo out of the "Corwin," in accordance with my contract, as part payment of the salvage, and after the sale he used them in taking the cargo out of the "Sudden" and other vessels. I did not have any money or funds up there belonging to the Nome Beach Company. This was the initial trip of the entire venture. The "Sudden" was going up there to establish the Nome Beach Company at that place, and she got in among the very first vessels that got in. There was no means of providing any funds for this company, except by means of the "Sudden." If Captain Morine had not been sick there would have been plenty, but he was too ill to attend to business. He came down here and died as the result of the illness he was suffering from then. I have been going

(Deposition of John L. Panno.)

to sea since I was ten years old; have been master since 1860, forty-two years ago. During those forty-two years I have been all over the world; there is no part of the world but what I have been. I have been going constantly to sea during those forty years. I sailed three vessels for twenty-seven years.

Upon redirect examination the witness testified: It was the "Corwin" people turned me out of the "Sudden." I suppose it was the purser. He told me he had charge of the vessel, and he was going to put another man there in my place, and he put a notice on paper on a piece of the mainmast that was there, that I was no longer wanted there.

Q. And then you left?

A. What else could I do?

Q. Then you left? A. Yes, sir.

The witness continuing, testified: I had a dozen interviews in reference to the stuff that was left on the "Sudden." There were four or five of them. It was a company, like the ship "Sudden." They had a place on the beach, where they landed the stuff, and I suppose I was down there twenty times. I would say to them, "What right have you to keep so and so?" and they would say: "Captain Tuttle gave us the right." That was the substance of our conversations. I did not make any endeavor to make any arrangements with the "Corwin" people as to the payment of salvage.

Q. If there was anything you said to the "Corwin" people or anybody else up there, with a view to getting back for the Nome Beach Lighterage and Transporta-

(Deposition of John L. Panno.)

tion Company, or to make any arrangements to get back for them, any portion of that cargo or that vessel, state what it was.

A. I had no other effort to make.

Q. If you made any other effort aside from what you testified to in answer to my previous question, tell me what you did.

A. I did not. I do not remember ever saying anything more that was to the point that I wanted; they would only laugh at me.

The witness continuing, testified: I mean, when I say that Captain Tuttle of the "Bear" gave it all to the "Corwin," that there was no court there, and Captain Tuttle was the court. They called a meeting and decided that what Captain Tuttle said was law. I had a conversation with Captain Tuttle about the goods being turned over; I asked him why he gave it to the "Corwin"—gave it all to them and he said, as long as the ship was going down, and they saved her, that they ought to have it all. I heard of coal being sold there during the month of June for twenty dollars.

Upon recross examination the witness testified: I told the "Corwin" people, "You have sold the cargo, and I should think it is nothing more than right that you should deposit the money in some bank, or some place here, or some good firm, and when there is a law comes here to Nome, that salvage should be settled." Before that I went to speak to them concerning the ship and cargo, and protested against their taking possession of the ship and cargo away from me, through a lawyer

(Deposition of John L. Panno.)

there in Nome. I went to them, and said I didn't see why they should take hold of it, and they laughed at me; and I though there was no further use in going there. They would not recognize me; I was nobody. At that time they insisted on their right to take it and sell it for their own use; and that is the reason I made no arrangement with the "Corwin" people concerning the salvage. They would not deal with me.

W. S. DAVIS, a witness called and sworn for plaintiff, testified as follows:

"I am a member of the firm of J. B. F. Davis & Son, managers of the defendant insurance company. For the firm, I attended to the marine insurance branch of the business. I have been doing that for about eighteen years. After the news of the loss of the "Catherine Sudden" came to San Francisco, the plaintiff notified me, and gave me freely all the information I asked for respecting that loss. Myself and the reinsurers called a meeting to hear the facts of the case. Mr. Van Ness was at one meeting, and asked witnesses on our behalf some questions respecting this loss. The plaintiffs presented to me many proofs of loss; I do not remember just what I asked for at the time, but the proofs, as far as I am personally concerned, that were furnished, were satisfactory.

Q. Are there any facts that you now know of, or have heard of since these proofs were furnished to you, other and different from the facts that were then within your knowledge?

(Testimony of W. S. Davis.)

Mr. VAN NESS.—I except to the question as immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled.

Mr. VAN NESS.—We note an exception.

The WITNESS.—None that I can remember.

The witness continuing testified: Having these facts before me, I said to the plaintiff, regarding its right under the policy and the amount that should be paid to it, in my opinion the proofs that were furnished were sufficient, and the loss should be paid, but that I could not admit full liability, or liability, on account of being stopped by my reinsurers. My company is a member of the San Francisco Board of Marine Underwriters, and was, at the time of issuing this policy, and at the time of this loss. I know Walter Gollin.

Q. In stating to these gentlemen that their proofs of loss were sufficient and satisfactory, did the fact that it was stated that Walter Gollin had consented to the sale have any effect on your judgment in the matter?

Mr. VAN NESS.—I object to the question as immaterial, irrelevant and incompetent.

The COURT.—You may answer the question.

Mr. VAN NESS.—We note an exception.

The WITNESS.—Yes, sir.

The witness continuing testified: For the reason that I have known Mr. Gollin ever since I have been in the insurance business, and I have great faith in his ability. He has been a representative— He was the representa-

(Testimony of W. S. Davis.)

tive of the Transatlantic Marine Insurance Company, and settled many losses, and I have always kown him to be strictly upright.

Q. Mr. Davis, did you consider that the interests of your company were being attended to at Nome by Walter Gollin?

Mr. VAN NESS.—That is objected to, on the ground that what Mr. Davis considered would not create power in Mr. Gollin.

The COURT.—The testimony can go in, subject to this objection. I will see later what his power was.

Mr. VAN NESS.—I desire an exception to Mr. Davis' statement of what Mr. Gollin's powers were.

The COURT.—I will allow the answer. It is simply preliminary.

A. I did not know, at the time I received notice of the loss, that Mr. Gollin was in Nome representing the underwriters. I did not attend the meeting when Mr. Gollin was appointed agent, but hearing afterwards that he had been appointed agent of the underwriters, I was thoroughly satisfied with what he did.

Mr. VAN NESS.—I move that the answer be stricken out as immaterial, irrelevant and incompetent, and not responsive to the question that was asked.

This motion was denied, to which ruling defendant then and there excepted.

The witness continuing testified: Before I took the insurance on this cargo on the "Sudden" I had an opportunity to see whether or not she was sheathed on the

(Testimony of W. S. Davis.)

outside above the water line. I knew the nature of the voyage the "Catherine Sudden" was going on, and that it was more than ordinarily perilous and risky.

Q. I will ask you, Mr. Davis, whether or not, having those facts in view, you did, or did not, charge a larger rate of premium than the going rate of premium for that vessel.

A. Well, in my opinion we did.

Mr. VAN NESS.—I ask that answer be stricken out, as not responsive.

The COURT.—No, sir.

Mr. VAN NESS.—We take an exception to the ruling of the Court refusing to strike out that answer.

Q. Mr. Davis, did you, or did you not?

The WITNESS.—I will answer the question by saying yes.

Q. Did this company subsequently make an abandonment of this cargo to you?

Mr. VAN NESS.—We object to that as immaterial and irrelevant and incompetent, in that it appears from the evidence that the cargo arrived at the port of destination in specie, and that having arrived in specie there can be no such thing as a constructive total loss made by abandonment; and whether abandonment was made or not is entirely immaterial.

The COURT.—That presents the question whether the vessel did arrive at Nome this way: that is one of the vital questions in the case. I will admit this testimony and resolve the doubt in favor of the testimony.

(Testimony of W. S. Davis.)

Mr. VAN NESS.—We note an exception.

Mr. FRANK.—I will show you this paper, Mr. Davis (handing witness a paper.)

The WITNESS.—I do not know whether that is the paper or not, but you served an abandonment on us, which was returned and not accepted.

Upon cross-examination the witness testified: Originally the insurance on the cargo owned by the Nome Beach Lighterage and Transportation Company and shipped on the "Sudden" was placed with the Standard Marine, a company that I represent, and I reinsured a considerable portion of the risk. The total insurance by the Standard Marine was $13,000. The reinsurance, I think, was $12,000. When the loss occurred, all of the original risk which I had insured had been reinsured, with the exception of $1,000. The fact that I had reinsurance did not influence my mind in dealing with these gentlemen. If I had had no reinsurance, I would have paid the loss. I was stopped by my reinsurers. The reinsurers asked for further proofs, and I was unable to furnish them. I furnished them all I had. They were at these meetings, and they heard everything that was said. They protested to me, through Mr. Van Ness, in writing, that if I paid the loss I would pay it at my peril. I told Mr. Frank that I was having difficulty in collecting the loss from my reinsurers, and that, if I could collect from them, that I would settle the loss, and if they had not stopped me, that I probably would have admitted full liability. I did not say to Mr. Frank that

(Testimony of W. S. Davis.)

I would recognize liability and pay that loss. I knew from the beginning of this Nome Beach business, after the news came down that the "Sudden" had been lost, that my reinsurers were questioning liability in that case, and believed and understood that they, unless they received some proofs which would change their minds from their earlier convictions, would not recognize liability. I did not want to admit liability, and be compelled to pay the loss, unless I was positive that I was going to collect from my reinsurers. That is what I told him. I had with Mr. Kruse, the president of the Nome Beach Company, practically the same conversation that I had with Mr. Frank, and told him if my reinsurers would follow, I would pay the loss; that the probabilities were, if I could not collect from my reinsurers, he would have to bring suit against us. I told Mr. Pennell, the secretary of the company, practically the same thing. I did not examine the "Sudden" before she sailed for Nome, and was not asked to by anybody connected with the Nome Beach Lighterage and Transportation Company. What the condition of the vessel was, I personally do not know. The current and usual rate for insurance upon vessels of that character at that time was from two and a half to three and a half per cent on the cargo under deck, and double rates on deck. That was the usual and customary rate for vessels going to sea at that season of the year. That would be for seaworthy vessels. We always suppose vessels are seaworthy when we take insurance on their cargo. We understand here there is always a warranty of seaworthiness in every

(Testimony of W. S. Davis.)

insurance on a vessel. If we had considered the vessel unseaworthy, we would not have taken it at all.

Upon redirect examination the witness testified: The rate of insurance upon vessels going north was limited to that season of the year; it was different in a later season of the year, and less amount. A vessel going to Alaska early in the season, we thoroughly understand that she encountrs more or less storms and ice, and we suppose, naturally, that the captain will use his best judgment as to keeping out of the ice. There was no restriction in the policy compelling him to. That is one of the risks we take.

Upon recross examination the witness testified: The rate in the summer season is all according to the vessel. A first-class vessel would range from one per cent to two per cent. This rate of two and a half per cent for cargo below deck and five per cent above deck is the rate that is made on a first-class vessel for that trip in the month of April. We considered this a first-class vessel. I considered her a seaworthy vessel for that kind of a trip at that season of the year.

Q. Is it not a fact that, as far as your personal desires and wishes are concerned, in view of your business relations with all these people, you would very much like to see the plaintiff get a verdict?

A. I would like to see the loss paid; and if you want an addition to that, I think it ought to be paid.

Q. You would very much like to see the plaintiff get a verdict in this case?

A. If you wish to put it that way.

Q. I wish to put it that way. A. Yes, sir.

(Testimony of E. L. Woods.)

E. L. WOODS, a witness called and sworn for plaintiff, testified as follows:

"I am secretary of the Board of Marine Underwriters, and have brought with me certain papers and documents of that association that were called for."

The witness produced certain correspondence and papers in his possession as secretary of the Board of Underwriters, and said papers were marked, respectively, Plaintiff's Exhibits 1, 2 and 3, and were offered in evidence by counsel for plaintiff and read as follows:

Plaintiff's Exhibit No. 1.

APPOINTMENT.

Whereas, the several insurance organizations represented in this board are accustomed to insure vessels and their cargoes against perils of the seas; and whereas, vessels insured may be wrecked or stranded in the vicinity of Cape Nome, Alaska, or be damaged during the voyage, so as to render it necessary to have assistance or advice, or to put into Cape Nome, Alaska, or some of the neighboring ports to refit: And whereas, on such occasions cargoes may be jeopardized and losses sustained, which it is supposed might be prevented by the exertions of a trusted agent: Therefore it is deemed useful to appoint an agent with power to act in preserving the property for the benefit of whom it may concern, but with this power only; and with a view to that end, the Board of Marine Underwriters of San Francisco has made and hereby constitutes and appoints W. W. Gollin its agent at Cape Nome, Alaska, to take measures for the

(Testimony of E. L. Woods.)

preserving and defending of property insured by the respective organizations represented therein, and for diminishing losses thereon, or damage thereto, subject to the accompanying instructions, which are to be exhibited on all occasions when the agent is required or may feel it necessary to act, so that no misunderstanding may arise with parties assured or their representatives as to the extent of the authority vested by reason of this appointment. And the board hereby revokes all former powers.

Witness our hands hereto attached, this 25th day of May, A. D. 1900.

(Signed) WM. J. DUTTON,
President.
EDW. L. WOODS,
Secretary.

INSTRUCTIONS.

The agent is to be watchful at all times, and particularly so during and after a gale; and on hearing of a wreck or wrecked property, he is to endeavor to be the first to be on board the wrecked vessel, or at the place of disaster, or where wrecked goods come on shore. If the master, or other person representing the owners, is in charge of property, the agent is to make himself known, and to give all poper information, and obtain promptly all material information—the name of the vessel, master and voyage, and particulars as to cargo, names of owners and consignees, and if the property is found to be of sufficient value, and the agent has reason

(Testimony of E. L. Woods.)

to think that the same may be insured by the undersigned, he is instructed to send intelligence, with all reasonable dispatch, to this city, stating the particulars in writing, to be addressed to the secretary of the Board of Marine Uunderwriters.

INTELLIGENCE.

The agent is also to furnish by mail, or other safe conveyance, such early intelligence of accidents, or other circumstances of danger or distress as may occur in his district or in the vicinity, and generally such information as he may deem of importance to the insurance companies.

The agent is to be careful to ascertain as promptly as possible, whether any of the underwriters are interested in the property, and when he ascertains that they are not he is withdraw, and all action on his part is to terminate.

SHIPS DRIVEN ON SHORE IN DISTRESS.

When vessels are in distress, or driven on shore in the neighborhood of the place where the agent resides, he is immediately to offer to the master such services as the nature of the case may require, and if the vessel is not much injured, to endeavor to put her afloat in order to perform her voyage; failing in this, and in case of shipwreck and a breaking up of the vessel, when neither the owners of the vessel or goods, nor their representatives are on the spot, the agent is to take such steps as he may deem the best for the preservation of the property,

(Testimony of E. L. Woods.)

by forwarding the same to this city, or to its destination by other vessels, and with the least possible delay, using reasonable economy in doing so. Small vessels can always be obtained, either by sending to this city, or at the bays and inlets along the coast, in which stranded cargoes can be shipped to this or other ports for a reasonable compensation, giving immediate advice of the circumstances to the assured, and following their instructions in all cases where he can obtain them. When salvage or remuneration is claimed for assistance rendered to vessels, it is proper for the agent to attend the meetings of the commissioners, magistrates or other persons legally authorized to determine the amount, in order to rebut any exaggerated statements on the part of the salvors, by the evidence of the master and crew.

REPAIRS OF VESSELS.

The agent is to make no other repairs to a vessel in his district than are indispensably necessary to enable her to reach one of the seaports, or to come to this port, or to proceed on her voyage if bound elsewhere.

In case the vessel cannot proceed to her destination, or a near safe port, without repairs, and it becomes necessary to have a suvey, the agent will see that intelligent professional men are employed as surveyors, and that in their survey and estimates they distinguish, as far as possible, between the damage sustained during the voyage on which the vessel is actually engaged, and the damage or defects existing prior thereto, and which are chargeable to the owners; and in case she cannot be

(Testimony of E. L. Woods.)

repaired so as to proceed, and her condemnation becomes unavoidable, it will then be his duty carefully to investigate whether the condemnation is occasioned by any natural defect or decay. If a ship arrive in a disabled state at an intermediate port, so as to be incapable of performing her voyage, the agent is to offer to co-operate with the assured or his representatives, in procuring a conveyance for the cargo to its original destination, in the best and most expeditious manner, and to protect against any sale of the cargo on account of the underwriters, unless unavoidably necessary, or the articles saved be broken packages of damaged flour, only partly full, or similar articles of small value, that will certainy bring the full value at the place of wreck; and in all cases of property of value, the agent will endeavor to postpone sales until information can be transmitted to this city to the underwriters, and an answer returned.

ABANDONMENT.

In no case is the agent to accept an abandonment of either ship or goods, on behalf of the underwriters, but leave the parties who abandon to act upon their own responsibility.

SEA DAMAGE.

When damaged goods are to be sold, they should be lotted in such quantities as are best calculated to suit purchasers generally, so that sales may be made as productive as possible. Should the separation of the sound goods from the damaged not be assented to by the consignee, master of the vessel, the owner or his represen-

(Testimony of E. L. Woods.)

tatives, the agent is to note their objections. He will not refuse to act on that account but will state the fact thereof in his certificate.

DOCUMENTS.

The protest will be required by the underwriters for the recovery of a loss, and also such surveys as shall have been had in reference to the property. The agent is not to make up or sign any statement of average, either general or particular as representative of underwriters, leaving that to be adjusted between them and the assured upon the documents which he furnishes.

REMUNERATION FOR SERVICES.

The remuneration must generally be received from the insured, or their representatives, or out of the proceeds of what may be saved in cases of wreck; and the agent is to observe that the underwriters are not responsible for charges on any business to which he may be introduced by his appointment. From the preceding instructions it will be inferred, but to avoid the possibility of misconception it is repeated, that in every act of interference, whether by advice or otherwise, the agent is not to be considered as the representative of the underwriters upon any particular policy, except when he is specially instructed to that effect, but as a person whose duty it is, from the nature of his appointment, to attend to the interest of the said underwriters, in the mode of treating property in peril or in a damaged state.

Whenever a special agent is sent to a wreck by a

(Testimony of E. L. Woods.)

company or the companies, he is to take precedence of all other agents, and his instructions are to control in all matters to which they relate; and if more than one agent is needed, the special agent is to act under the instructions given to him.

The insurance companies further wish to impress upon the mind of the agent, that they expect him to attend to the interest of the companies generally, in his district, and they hereby request him to protect them against imposition, unnecessary losses and excessive charges. And when the circumstances in any case are such as to preclude the possibility of obtaining his compensation for services either from the property or from the owners of it, the company or companies inteested therein will make the agent such reasonable remuneration as they think fair and proper for the time employed and the services rendered for their benefit. It being understood that the agent is to report at least once a week to the company interested the progress making, so that no large bill shall unexpectedly be made without the knowledge of the services as they are performed. It is also understood that the commissions and fees charged by the agent at shall not exceed those usually charged by the agents of Lloyds of London, or by the agents of New York underwriters, resident at that port.

DEPUTY.

If from sickness, or other causes, the agent cannot attend in person, he may appoint a discreet and confidential person to act as his deputy under these instructions.

(Testimony of E. L. Woods.)

Survey.—The agent, if called on by the consignees of a cargo to examine it, will only act as a surveyor when his experience of the class of goods to be surveyed enables him to pronounce an accurate opinion. But when he does not act himself he will appoint properly qualified surveyors, and will take care that the survey is conducted in accordance with the following general instructions:

A. A special survey should be held on the hatches of the vessel, and also as to the stowage and dunnage of cargo.

B. Damage by sea water during the voyage should be carefully distinguished from damage arising from other causes, as, for example, from bad stowage or packing, vermin, pilfering, inherent causes, sweat or from the goods having been exposed to rain or dampness before shipping or after discharging.

In all cases the agent should personally satisfy himself that these instructions are carried out.

Survey on Landing.—The survey should take place as soon as the goods are landed, and with this object the agent should immediately offer his services to the consignee. In the event of any unreasonable delay taking place before the agent's services are called in, the agent should not refuse a survey, but should grant a certificate, with the date of the arrival of the vessel, and the date and place of survey prominently noted on it.

Auctions.—In cases of public sales where combination amongst buyers is likely to result in property being sac-

(Testimony of E. L. Woods.)

rificed, the agent should see that sealed tenders are advertised for, if such a course can be legally pursued.

Auctioneers.—With a view to prevent frauds upon underwriters, the agent should endeavor whenever a public sale is necessary, to have a voice in the appointment of the auctioneer, and should see that due publicity of sale is given.

Damage in Lighters.—In all ports where it is necessary to discharge goods into lighter or craft, the agent is required to ascertain whether the person in charge of such lighter or craft has given or demanded of the master or mate of the vessel a certificate, expressing any apparent damage or defects in the goods delivered, and the agent is to make a note of the same upon his survey.

Deck Loads.—The agent will report as to any goods improperly laden on deck.

Sale to Take Place in Reasonable Time.—The sale should take place within a reasonable time after the cargo is landed, and the usual certificate must give the market price of the goods on the day of sale.

Exaggerated Valuations.—Care should be taken to prevent exaggerated sound values; and if part of the goods arrive in a sound state, and are sold, a certified copy of the account sale of such sound part much always be furnished.

Compromise.—The agent may agree to an appraised damage to goods in cases where the claim is so small that it would be much increased by the expense of notarial documents, advertisements and other charges of public sale; but in all cases where the agent does this, he is

(Testimony of E. L. Woods.)

to note in his certificate that it is subject to the conditions of the Policy of Insurance on the goods in question, and append a certificate of the sound value of the goods according to form.

Salvage Proceeds.—In the event of salvage proceeds of either ship or cargo passing into the hands of the agent, he is at once to remit the same to the Board, if possible, with the documents required for the division of the amount among the persons interested.

Authentication.—The agent is, in all cases, to authenticate the signatures of surveyors, and also to certify all proofs of loss.

Agency.—The agent must not act as a representative for any salvage or wrecking association, without the consent of the Board.

Plaintiff's Exhibit No. 2.

San Francisco, 25th May, 1900.

W. W. Gollin, Esq., Present.

Dear Sir: Enclosed please find your appointment papers as agent of the Board at Cape Nome.

I trust you will find your instructions sufficient for your guidance. They are practically in the form adopted by all the large underwriting bodies, such as Lloyds, National Board, etc.

Your experience in the insurance business makes it unnecessary for me to say more.

I am aware that your position will be somewhat difficult, but in case of trouble, you will find plenty of competent men to act as surveyors. You will bear in mind

(Testimony of E. L. Woods.)

that an agent's duty is chiefly to advise the responsible parties, such as Master, and to assist him—not to relieve him of his legal responsibilities.

I would add that all the companies doing business to Alaska are members of the Board, with the following exceptions; the Thames & Mersey, North China & Imperial, Canton and Nippon, Sea and Land.

Wishing you a prosperous voyage and that your venture may be successful, I am,

Yours faithfully,

(Signed) E. L. WOODS,

Secretary.

I enclose press copy of a letter on introduction given to Mr. Frame, at the request of Mr. Frank of Andros & Frank; of his merits you will have to judge for yourself.

Plaintiff's Exhibit No. 3.

NEWMAN, GOLLIN, CARLSON CO.

(Incorporated)

Dealers in General Merchandise and Commission Merchants

Miners' Outfits a Specialty

Nome, Alaska T., June 18th 1900.

E. L. Woods, Esq., Secy. Board of Marine Underwriters, San Francisco.

Dear Sir: I landed here June 14th, 1900, safe and sound. Passing down the main thoroughfare, I saw a crowd and an auctioneer hard at work, asking one of the crowd what was going on, I found they were selling

(Testimony of E. L. Woods.)

the cargo and hull of the "Catherine Sudden." I went up to the auctioneer and handed him my card & stopped the sale until I was satisfied that everything was in order, in fact I was welcomed by Mr. F. W. Heustis, the President of the "Corwin" Co., and Captn. Humphreys of the Steam Whaling Co. I found the protest had been extended and a survey held, and under the circumstances, the only thing to be done was to allow the sale to go on, as in case of a storm, she was likely to go ashore and then nothing would have been saved, and of course, this was entirely against the interests of the Corwin people. Every effort was made to find the owners of cargo, so that they could bid on their shipments. The conditions of the sale were that the goods were sold as appeared on the manifest, in fact many purchasers will find that a quantity of the cargo has disappeared and they have no recourse. The hull has been offered to me at less than it brought. Moreover, the purchasers of cargo had to lighter the cargo and arrangements were made to charge $2.50 per ton for placing the cargo on the deck of the vessel. It was impossible to obtain a lighter, of course, had it been possible to have got the merchandise on shore, the results would have been more profitable but considering the disadvantages, (which have to be seen to be appreciated), I am satisfied that the steps taken were the best. The proceeds of the sale are held by Mr. Heustis, Pres't of Corwin Co.

I enclose you an account of the loss of the Bark Alaska. This is the wildest place I ever struck, and I am afraid that the Underwriters will suffer considerably

(Testimony of E. L. Woods.)

This place is not so bad when you get here & by avoiding lighterage on unfavorable days, I consider it fairly safe, but the main risk, I consider, is tackling the voyage too early in the season, and getting entangled in ice floes, this is particularly dangerous for sailing craft.

The bark Hunter and Schr. Eclipse are reported lost, both crews being saved. The steamer Centennial was on the spit at Dutch Harbor & has been condemned. I was told of this just now. Captn. Humphreys tells me that the Stmr. Rosecrans is ashore on the mud flats off Yukon mouth and is in a very dangerous position. The stmr. Lakme has arrived with the J. A. Falkinberg in tow. I think she has had a hard time of it. It is very hard to get news here, the wildest rumors gaining credence, but one thing is certain that smallpox is prevalent on several of the steamers, and I know of one case here. The Olympia arrived & reports three deaths from pneumonia and five in a bad condition.

Herewith find statement and return of auction sale of "Catherine Sudden." I suppose Captn. Humphreys will send the protest.

There being no place for incoming vessels to report to, it is hard to get a record of arrivals and departures, perhaps when I get more familiar with this place, I will be able to give you more information.

With regards.

Very truly yours,

(Signed) WALTER GOLLIN.

(Testimony of E. L. Woods.)

(Enclosures.)

Wednesday, June 13, 1900.

BARK ALASKA NO MORE.

Thousands Witness the Destruction of the Gallant Old Whaler on the Beach.

Acres of Ground Covered with Her Wreckage—Longshoremen Make Small Fortunes—No Insurance on the Ship.

The famous old whaling bark Alaska, commanded by Captain Cogan, which has been so long on this coast, was wrecked Wednesday on a sand reef.

COLLIDED WITH A BERG.

Dire Ruin Wrought the Catherine Sudden—A Fire Aboard the Steamer Santa Anna.

The Senator Has a Hole Stove in Her—Ship Tacoma on a Reef—San Blas, Dora, Fulton and Others in.

In tow of the erstwhile revenue cutter Corwin, with all masts gone and her upper works swept clear, the barkentine Catherine Sudden, of San Francisco, came into port Sunday evening. She looked indeed, the wreck she was. The Sudden, Capt. J. L. Panno, was of 515 tons register, and left San Francisco April 28th with a general cargo for the Nome Beach Lighterage and Transportation Co. May 3d, when in latitude 62:30 and 162:20 north, she struck an iceberg and knocked in the port bow. The ship began to fill rapidly and ran on an iceberg. After the vessel was full she rolled down on her port side, taking away the foremast, mainmast and head of the mizzenmast. Meanwhile the brig Pitcairn came alongside and the passengers went aboard.

(Testimony of E. L. Woods.)

A little later the steamer Corwin came alongside, hauled off a steam launch and put steam pumps in the Sudden, tipped her astern and towed her to Nome. The ship and cargo were worth $75,000. The Corwin will get a rich haul of salvage out of her.

The witness testified: "Exhibit No. 2 with No. 1 enclosed was handed by me in my capacity as secretary of the Board of Marine Underwriters, to Mr. Gollin, about May 25th, on his departure from San Francisco for Nome."

Defendant objected to the introduction in evidence of Exhibit No. 3, to wit, the letter of W. W. Gollin to the witness Woods, upon the ground that the statement in said Exhibit 3 of the things done by the writer of that exhibit was a statement of things having been done which were outside of the authority of the writer.

The Court overruled the objection, to which ruling defendant then and there excepted, and said Exhibits 1, 2 and 3 were then offered and read in evidence.

Counsel for plaintiff then offered and read in evidence, by the consent of the defendant, said newspaper clippings above set forth.

Q. Mr. Woods, I notice here that there was a report of the sale enclosed. Do you know what became of that report of that sale.

A. I have it.

The witness, at request of counsel, here produced the report of sale, and said report was offered and put in evidence and marked Plaintiff's Exhibit No. 4, and read as follows:

(Testimony of E. L. Woods.)

Plaintiff's Exhibit No. 4.

REPORT OF SALE OF WRECK OF BARKENTINE "CATHERINE SUDDEN."

To Whom it May Concern:

After notice duly given by publication in the newspaper, "The Gold Digger" a newspaper of general circulation, printed and published in Nome, District of Alaska, and by posting notices in six (6) conspicious places in said City of Nome, and pursuant to the consent and agreement of Captain O. J. Humphreys, owners' agent, Capt. J. L. Panno, Master, and Walter W. Gollin, agent of the Board of Marine Underwriters, of San Francisco, the sale of the wrecked barkentine "Catherine Sudden" and her cargo was had in front of the office of the Pacific Steam Whaling Company, on Front Street, in the City of Nome, District of Alaska, on Thursday, the 14th day of June, 1900, at 10 A. M., of said day, at public auction, the said Humphrey and Gollin being personally present at said sale. The said cargo was sold as per the manifest, each consignment being sold seperately, and the ship's stores and the goods belonging to the ship's owners in one lot, and the hull including all the furniture, rigging and appliances belonging to the ship, was sold in one lot.

Mr. Geo. O. Fogg, Treasurer of the Corwin Trading Co., salvors of said barkentine, and Mr. M. D. Platt, representing Capt. O. J. Humphrey, agent of the owners, acted as clerks at said sale, and make the following report of same. Report attached hereto:

(Testimony of E. L. Woods.)

Lot No.	Consignee.	Amount sold for.
1	E. O. Tuttle	$ 100.00
2	Hank Summers	75.00
3	Henry Schwartzhultz	10.00
4	Pioneer Western Lumber Co.	80.00
5	Thomas L. Pelletier	610.00
6	Blanch Mining Co.	95.00
7	J. D. Wetherby	75.00
8	Deenen and Colcord	80.00
9	N. Bontain	115.00
10	Dryden & Dyer	400.00
11	J. Tyrell	55.00
12	Mrs. L. Quint	16.00
13	R. Tedford	4.50
14	The Alaska Venture Co.	1600.00
15	E. G. Gould	75.00
16	E. M. Dyer	110.00
17	Robie and Anderson	500.00
18	Noqers, Baker & Yoder	300.00
19	Allen & Fox	200.00
20	G. W. Close	405.00
21	Dickey & Howard	$ 325.00
22	William Fox	305.00
23	A. H. Barber	100.00
24	C. H. Gray	455.00
25	Alaska Exploration Co.	400.00
26	L. W. Selwyn	30.00
27	Anchors, Buoys & Cables for lighterage	140.00
28	Hull, etc.	1.350.00
29	Ship's stores, etc.	530.00

Total, $8,540.50

GEO. O. FOGG.

N. D. PLATT.

District of Alaska,
United States of America. } ss.

Geo. O. Fogg, being first duly sworn, on oath says, that he has read the foregoing report and statement and knows the contents thereof. That the facts therein mentioned are true, and that the statement of the proceeds of said sale, is a full, true and correct statement of the same.

[Seal] EDWIN B. McGOWAN,
Notary Public in and for the District of Alaska.

District of Alaska,
United States of America. } ss.

H. D. Platt, being first duly sworn, on oath says, that he has read the foregoing report and statement and knows the contents thereof. That the facts therein mentioned are true, and that said statement is a full, true and correct statement of the proceeds of said sale.

[Seal] EDWIN B. McGOWAN,
Notary Public in and for the District of Alaska.

Approved.

O. J. HUMPHREY,
Agt. N. B. L & T. Co.

Approved, June 18th, 1900.

WALTER W. GOLLIN,
Agent Board of Marine Underwriters, San Francisco.

(Testimony of W. W. Gollin.)

W. W. GOLLIN, a witness called and sworn for plaintiff, testified as follows:

I am the gentleman spoken of in Plaintiff's Exhibits 1 and 2. I went up under that authority to Nome, Alaska, in the spring of 1900, representing the Board of Marine Underwriters in this city heretofore. I was for twenty-five years and a half manager of the Transatlantic Marine Insurance Company in this city.

Q. As such manager, I suppose you had large experience in marine insurance matters?

Mr. VAN NESS.—We object to that as irrelevant, immaterial and incompetent.

The COURT.—I overrule the objection.

Mr. VAN NESS.—I will take an exception.

A. Yes, sir.

The witness continuing testified: As manager of an insurance company, I have adjusted and settled many losses in my time. I arrived at Nome, June 14th, 1900, and found a crowd on the street. I asked someone, "What is the trouble?" They said, "An auction sale of the 'Catherine Sudden.'" I elbowed my way pretty strenuously through the crowd, and went to the stand—they were on a sort of a little platform—and I handed them my card, saying I was agent of the Board of Marine Underwriters, and as such I wanted to know the reason of the sale; or words to that effect. They were very glad to see me, they said, but there had been no agent, and, in fact, gave me a welcome, and they professed their willingness to satisfy me in every respect, and I asked them to adjourn the sale,

(Testimony of W. W. Gollin.)

which they did for one or two hours. I went over to the office of the Pacific Steam Whaling Company. This company is a highly respected company, and I have known them in San Francisco for twenty odd years, and have known their representative. I went fully into the facts of this case. I asked if there had been a protest extended, and there had been. I asked if there had been a survey made; a survey was produced and the parties present. One of the parties I was personally acquainted with. Captain Harriman, a man of long experience, whom I had confidence in. The second man was a man who was vouched for, a Captain Ferguson, whom I was not personally acquainted with. The third man was a man whose position vouched for his standing. He was a carpenter on the United States steamer "Bear." Taking every thing into consideration—the condition of affairs there; that a storm might come up at any moment; and whereas a steamer could get away under the lee of Sledge Island, and a sailing vessel might put out to sea, using the sails; and a vessel in the condition that the "Catherine Sudden" was in, being in such a dilapidated condition, practically a wreck, she would certainly have gone on to the beach, and everything would have been lost; under those conditions, and the conditions tending toward the salvage of that vessel—I have been in the ice myself; I was on the "St. Paul" in the ice—and I venture to say that the services rendered by the "Corwin" were such that no other steamer would have rendered. They could not. They would not have taken the steamer. Any passenger steamer, loaded with passengers as they were, would only

(Testimony of W. W. Gollin.)

have taken the crew off of the vessel, and would have left the "Catherine Sudden" to founder. The "Corwin" was particularly fitted for such an enterprise that might come along. They were a party of intelligent men; and I might say, I am sorry to have heard slurs made about this thing. I am satisfied that everything was done that any merchant or respectable set of men could do in order to effect this arrangement and this sale. It was fair and square, and whatever I have done, after mature reflection I would do again. My experience as an underwriter of thirty years in this country is such, that I never, I may say, saw a fairer claim. It is this conduct that gives the insurance companies a bad name everywhere.

Mr. VAN NESS.—If your Honor please, I move to strike out this gentleman's argument upon behalf of the plaintiff in this case.

The COURT.—I do not think you ought to refer to that as an argument, Mr. Van Ness.

Upon request of counsel for defendant, the reporter read all of the witness' testimony, commencing with the words "They were a party of intelligent men," down to the end of his statement. Whereupon counsel for defendant moved to strike out all of the testimony so read by the reporter.

The COURT.—So much of the statement as to having heard slurs ought not to go in; and, furthermore, what he said with reference to this conduct about insurance companies will also be excluded. But otherwise denied

(Testimony of W. W. Gollin.)

defendant's motion to strike out; to which refusal defendant then and there excepted.

The witness continuing testified: Mr. Ferguson, of whom I have spoken as being one of the surveyors, was present at the Board of Trade in Nome. After I made my investigation I returned to the sale and allowed the sale to go on. I simply said to those people that everything was fair, and I was satisfied that the action taken was for the best interests of all concerned. At Nome, at that time, there was no law at all. The court had not been established there, and was not, I should judge, until six weeks or two months after.

Q. What was the condition, with reference to commercial enterprise; what were the people doing there? Were they borrowing and loaning money, or were they engaged in mining, in prosecuting mining enterprises?

A. Well, there was rather a confused state of affairs, I might say a chaotic state of affairs, there. There was very little mining going on there when I arrived. They were landing immense amounts of merchandise on the beach. In fact, it was impossible to obtain a lighter, or anything like that, for a time to come. The beach was piled high with merchandise of all descriptions. Money was in great demand. For instance, certified checks on the First National Bank were at ten per cent. In fact, I purchased a bank draft myself, that a friend of mine had, for $3,000, drawn by the Canadian Bank of Commerce on the Bank of British Columbia in San Francisco, I purchased that $3,000 draft, which was as good as wheat, for $2,800, and in doing that I did Mr. Cooper,

(Testimony of W. W. Gollin.)

who owned the draft, a favor, inasmuch as he had been to the bank, and they had asked him $300 to cash it. Money was only to be had at very exorbitant rates. Ten per cent for cash. And it was not generally to be had, even at those rates. Money was very scare. It was only as a favor that you could get it. During my conferences, and during this examination, I met Captain Humphrey. I simply saw him as agent of the Pacific Steam Whaling Company, that I was very well acquainted with in San Francisco. I went into their office to look over all the papers. Everything was laid before me thoroughly; the survey of the vessel, the condemnation of the vessel, the condition of the "Sudden," and the statement of the salvors in regard to what had been done. As I said, I was guided a great deal by the fact that a storm might arise, and she could not get ashore, and the cargo would be entirely lost. Mr. Humphrey was present in the office during the time I was making these examinations. He didn't take any part in it, simply confirmatory. I asked him certain questions, naturally, I wanted to get all the information I could from him, and from others. I made use of my acquaintance with Captain Humphrey, in order to determine things and find out facts. I got my information from anybody that I could, and I thought knew anything about it.

Q. Did you make an investigatioin concerning the notices of sale? A. Yes, sir.

The witness continuing testified: I sent for the newspapers, saw copies of papers, and found out that the notices had been posted in various parts of the town, and

(Testimony of W. W. Gollin.)

everything had been done that I found was necessary. I found out whether special notice had been given to the different consignees of the cargo to come and bid at the sale if they saw fit. I believe there was a notice. I saw quite a number. In fact, we stopped the sale once to allow certain consignees to go away and get some money, and sent notices to some that were not there. We sent a notice to the Alaska Exploration Company. They had a lot of coal on board; to give them the chance to bid on the stuff. And there were others. I don't think the Alaska Exploration Company came and bid on their coal. I sent them special notice to come, and stopped the sale. There was one man there who wanted to be allowed to bid, but he did not have enough money, and I told him we would wait for him until he could go and get the money. I was not only the agent of the Board of Marine Underwriters, but I had my own business to attend to. I was not sacrificing the interests of the Underwriters, or anyone, for my private business, but was giving every attention to it.

Upon cross-examination the witness testified: I had never been to Nome before I went there in May, 1900. I went there to represent the underwriters, to the extent that the powr of attorney gave me that right, and also upon business of my own. The representation of the underwriters was an incident to my going there on other business, which was general merchandising and lumber. I had two partners in Nome. I arrived at Nome on June 14th, somewhere about noon, and landed on the beach in

(Testimony of W. W. Gollin.)

a small boat. The weather was pleasant. We had no difficulty in landing. I was on my way to my place of business when I noticed a crowd, and walked up and found what it was. Someone in the crowd told me they were selling the "Catherine Sudden." I could not say if the auctioneer was actually selling the goods. He was a very competent man. I never heard a finer auctioneer. The auctioneer was one of the Corwin Company. I said to him that I represented the Board of Marine Underwriters, and wanted the sale stopped until I could inquire into it. Captain Heustis, the manager of the Corwin Company, was there. I was introduced to him. Captain Humphrey was there, I think. I knew Captain Humphrey. My acquaintance with him is very limited. I told Captain Heustis I was the representative of the Board of Marine Underwriters of San Francisco, and that, as such representative, I wished to know upon what authority he was selling the "Sudden." He said that he was prepared to show me, and was very glad to meet me, and adjourned the sale. Captain Heustis seemed to me to be very pleasant indeed. Every suggstion I made he acceded to

Q. Then you are satisfied, from what you say of Captain Heustis, that he was a man who was willing to accede to every reasonable proposition that might have been made? A. I cannot say as to that.

The witness continuing testified: The sale was adjourned. The auctioneer simply told the crowd that the agent of the Underwriters had arrived, and had to be satisfied about that, and the sale would probably be continued in an hour or two. I went with the whole gang—auc-

(Testimony of W. W. Gollin.)

tioneer and everybody. There was Humphrey and the auctioneer, and Captain Heustis. I believe there was somebody else; anyway, there must have been four or five. I did not understand that Captain Humphrey was acting for anybody at that time, in connection with that sale, and he did not tell me that he was. I and Captain Heustis and Captain Humphrey, and the auctioneer went to Captain Humphrey's office, to the Pacific Steam Whaling Company's office. Between the time I came from the place of the sale and the time that I was with Humphrey and Heustis and the balance of those people in the office of the Pacific Steam Whaling Company, I had not made any examination into the business conditions at Nome. Captain Heustis told me what he had done for the schooner, the services he had performed, which I was pretty well informed about, not only by myself but by others as well. I could not give you the conversation in detail from beginning to end. He simply told me what had happened. I have the impression that the informed me what he had done, and how he claimed the "Corwin" crowd were the salvors, and he claimed salvage on this vessel.

Q. Now, I ask you to give me, as near as you can recall it, the conversation with Captain Heustis; what you said, and what he said. I do not mean by that, that you are to repeat literally every word as he used it or as you used it, but give me your remembrance of the substance of what was said back and forth. Tell me what you said, and tell me what he said, without giving your conclu-

(Testimony of W. W. Gollin.)

sions as to results. I want what was said by each of you.

A. I am trying to tell you that in my own way, but you won't let me. My answer to that is, I do not remember. The service was, that he had taken the vessel in tow, and performed certain acts of salvage. He pumped out the vessel, and effected certain repairs, and towed her into Nome. That is what he told me. I do not remember that he told me that he had taken any portion of the "Catherine Sudden's" cargo on board the "Corwin." I heard the cargo had been looted. Up to the time the papers were shown me, Captain Humphrey did not make any statement at all about the facts connected with the saving of the "Sudden" and the bringing her into Nome. The papers that were shown me were the protest, the survey and the condemnation of the vessel and the manifest of the vessel. I do not remember in what way the cargo of the "Sudden" was described upon the manifest. I was engaged in that conversation about an hour. After I had been shown those papers I was satisfied to let the sale go on, and then went back with Captain Heustis and the auctioneer and Captain Humphrey, and said the sale might go on.

Q. Now, then, you have given us, in response to the questions that I have asked you, as I understand you, everything that occurred between the time that you arrived at Nome and the time you went back and said, "The sale may go on?"

A. No, sir, I have not. But you asked me to particularize the men I had the conversation with, and I could

(Testimony of W. W. Gollin.)

not do it. You shut me off when I want to say anything. I have told you, as far as I can substantially recollect, everything that I did, and everything that was done between the time that I arrived there and the time that I returned and said the sale might go on. After we came back I remained at the sale about two hours, and then we adjourned the sale. We adjourned to allow people to be notified. Some had not been notified and did not know where they were—notably, the A. E. people; and another party wanted it adjourned to get a chance to get some money in to buy certain things, and we adjourned it for that; and also to notify all the consignees that could be notified to come and protect their shipments. I simply sent word to them, and notified them that the sale was going on, so they could have a chance to buy their stuff in.

Q. You sent word?

A. I was one, I suppose, yes, sir. * * *

Q. You say you sent word to these consignees to enable them to come. What did you do yourself in that direction.

A. I rather think I went myself to the Alaska Exploration Company, but I would not like to swear to that, it is so indistinct.

The witness continuing testified: There were other consignees there at the sale before we adjourned, and one particularly said he would like to buy that lot in, but he had not the money quite, and we stopped that lot and allowed him to go and get some money, and reserved that lot for him so he could get the money and

(Testimony of W. W. Gollin.)

get it. I did not go to any other consignee, except the Alaska Exploration Company. I do not know that I went to the Alaska Exploration Company. I would not like to swear to it. I would not like to swear that I went to anybody. I do not know whether anybody else who was there went to any other consignee to notify them to come and bid on their goods. I do not know who bought in the coal that belonged to the Alaska Exploration Company. I arranged that sale in this way; after learning that portion of the cargo had been looted, and not being able to state what cargo had been looted, we arranged to sell the lots as they were on the manifest, each lot as on the manifest, and with no come-back in case that the amount of the stuff was not on board. That was the arrangement. It was a sort of gamble when the people went in to purchase, it is true, but it was the only way I could think of. Whether or not I suggested it, I cannot say, but that is the agreement we came to. I thought it was better. We would realize more that way. For instance, if there was fifty tons of coal sold on this bill of lading or manifest, and the amount bid was $300, and he only got twenty tons of coal, there was to be no reclamation; he was paying his $300 for that twenty tons of coal.

Mr. VAN NESS.—Q. Will you permit me to ask you what business it was of yours whether there was any come-back or not?

A. A good deal of business. I was trying to get the best I could for that cargo, the largest amount of money.

* * *

(Testimony of W. W. Gollin.)

Q. How long did you stay in Nome altogether?

A. I think I left there October 18th.

The witness continuing, testified: I did not see anybody that I knew represented the Nome Beach Lighterage and Transportation Company at any time during the interview that I had with Heustis and Humphrey, or at the sale itself. There was an enormous number of stores at Nome, and about twenty or twenty-five thousand people stranded there, of which, I should judge when I landed there, there was probably about fifteen hundred housed; the balance was scattered everywhere over the tundra, over the beach. Everything to the water's edge was jumped, every foot of ground; in fact, my own business place was jumped. A great deal of merchandise was just piled up along the beach. You must remember that these goods were landed on the beach; there was no shelter there at all; the people who had the goods had no place to take them; they were waiting there until the men who had them found accomodations to house them.

Q. In the meantime, they sold the goods from along the beach?

A. They sacrificed them. If they wanted to get rid of anything, they slaughtered them and almost gave them away.

Q. You know it to be a fact, do you not, that everything sold up there at very high prices, and away above the original cost?

A. No, sir; I do not know anything of the kind.

The witness continuing testified: I could not tell you

(Testimony of W. W. Gollin.)

the value of coal at the time I arrived at Nome on June 14th, but it was not very high. I do not know what the value of coal was on the day of the sale. Allow me to explain that there is no such thing as a market in Nome. A man might be selling coal at fifty dollars a ton three or four blocks down, and a man might be selling it at twenty dollars a ton three or four blocks up. There was no such thing as a market in Nome. I could not say what prices were being realized for coal when I got there. I should judge a party could have sold a little lumber for one hundred dollars a thousand, two or three thousand feet, or something like that. I had no lumber for sale. There was very little lighterage there; very difficult to get a lighter. I knew nothing about the lighterage plant that had come up on the "Sudden," and for the salvage of which Captain Humphrey paid the "Corwin" people $2,500. I never heard anything about it until the meeting in the board room of the Marine Underwriters. I never heard of it at Nome. Captain Humphrey never said a word to me about it. I spoke to Heustis about whether this cargo—Heustis, or someone there, I could not say whether it was Heustis, but, anyway, someone connected with the crowd—whether it was not possible to have that stuff lightered, and the information was given to me that there was no lighter to be obtained; that everything was occupied; that all was busy. I saw that myself, because it was pretty hard to get stuff landed. That question which I put to Captain Heustis, whether or not there was any lighterage facility there for getting this cargo out of

(Testimony of W. W. Gollin.)

the "Sudden" and getting it ashore, and his answer to me that there was no lighterage available for that purpose, that question was asked by me, and that statement was made to me, during the time that I was having this interview in the office of the Pacific Steam Whaling Company and while Captain Humphrey was present.

Q. And Captain Humphrey did not deny that, or make any statement concerning it in your presence?

A. He did not say anything at all. * * * If I might explain: in asking these parties connected with the "Corwin" about the lighterage, whether it could be readily had, whether there was any possibility, I had this in view: that I considered that the "Corwin" people had a claim to that almost as a derelict, and if they were satisfied, of course, they had a large claim against it for salvage; they would have been awarded a considerable sum; there is no question about it. I thought, if the goods could be put on shore, there was a chance that they would realize more money. But they being satisfied, and they being the parties more interested in the case, I thought, by virtue of their being the salvors, than anybody else, and they being satisfied to have the goods sold just as we agreed upon, there was nothing to it. There was no lighter there. I was not going to take the chance of a storm coming up. The vessel could not get out of the way. If a storm came up she was bound to be lost; and the sale was continued.

The witness continuing testified: If I had known that there was a lighterage plant in Nome owned by the Nome Beach Lighterage and Transportation Company

(Testimony of W. W. Gollin.)

and under the control of Captain Humphrey, which could have been used to lighter the cargo, I might have taken that into consideration. I do not know. It is just this way: First of all, I did not know about it, and, secondly, the question would be whether the lighters, in case a storm came up, would do any good or not. I have seen lighters just chucked up on the beach there, a literal wreck. As an underwriter of twenty-five years' experience, if I had known that there was a lighterage plant there available for the purpose of bringing these goods ashore and getting them out of the vessel, I think I would, as an underwriter, consider it to the interest of the underwriters and the owners of that cargo, to make an arrangement with the "Corwin" people to get that cargo on shore before it was sold. I did not know the value of the cargo consigned to the Nome Beach Lighterage and Transportation Company. Mr. Heustis told me that, in holding the proceeds of the sale, he was going to hold them until the court arrived, so it might be determined by the court the salvage they were entitled to. Captain Heustis never expressed to me any disinclination to have his salvage service fixed at whatever was right or reasonable. I understood that he was willing to do that; that he was willing to abide by the court's decision. He always gave me to understand that he was willing that the amount of his salvage service should be fairly fixed at whatever the right and proper figure was by the court.

Upon redirect examination the witness testified: If, in addition to what I know at the time, I had known

(Testimony of W. W. Gollin.)

of the existence of the lighterage plant, I think I would still have advised the sale. I think I did the best for the interests of all concerned. I think that if I had known that the lighterage plant was there, I still would have done the same thing. I have no reason to doubt the good faith of Captain Heustis in the whole matter. It is a common occurrence for vessels having motive power up there, steamers, to abandon the discharge of their cargo and put to sea. It was after the sale that Captain Heustis gave me to understand he was willing to have the salvage fixed by the court. He wanted the sale to go on.

Upon recross examination the witness testified: At that time there was one bank in Nome, The Alaska Bank and Safe Deposit Company. I was in a position to discount good paper if I wanted to. The Pacific Steam Whaling Company, of which Captain Humphrey was the agent, is a well known concern up there, with very good credit. Nobody's paper passes current there. It costs ten per cent to discount it. I myself, my firm, would have been glad to have discounted the paper of the Pacific Steam Whaling Company for $1,000 or $1,500, charging them ten per cent. We would not, as a business proposition, have discounted their draft for $2,800 as soon as the draft we bought, because there I got a bank's draft, and that is better than any individual's. I had known Captain Herriman for years and years as a sea captain.

(Testimony of Albert H. Herriman.)

ALBERT H. HERRIMAN, a witness called and sworn for plaintiff, testified as follows:

My occupation is lightering at Nome Beach, and has been for the last three years. I am a master mariner, and have been twenty-four year, sailing all over the world. I have been, for this season, in the employ of the San Francisco Board of Marine Underwriters, as surveyor, at Nome. I was at Nome in the early part of June, 1900, when the "Catherine Sudden" came in. I was one of the surveyors who surveyed the condemned ship and cargo. On going aboard we found the cargo—the first thing we did was to sound the pumps, to see if the ship was making any water. We then took the hatches off, mizzen and main, and found the hold full of cargo. We found this cargo had been completely submerged with water clear up to the upper part of the main deck. We found the fore hold, as near as I can remember, for a space of sixty feet, without cargo. The cargo that we saw in the hatches consisted mostly of barrels and boxes, groceries, and the like of that; I should judge case goods, that had been completely wet. The ship lay about a mile and a half or two miles off the beach, without spars, sails or any propelling power whatever, which left her in a very dangerous condition. If a gale of wind came along she had nothing to get off shore there, as other vessels had. The weather there is very catching. We are liable to get a gale there at any time. By our report we recommended this cargo to be sold as soon as possible there, on account of the cargo being

(Testimony of Albert H. Herriman.)

thoroughly wet, and no warehouse room to put it on shore; no place where we could put it on the beach, without scattering it the whole length up and down the beach, because there was not a place within the three-mile limit where you could put all that cargo intact. That was the reason we ordered the cargo to be sold, and sold as soon as possible. We recommended the cargo sold as soon as possible, for the benefit of all concerned. Had it been in any other port but Nome, where there were warehouse facilities, and where it did not cost so much to get the cargo ashore, we would have made a different report. I should then have recommended the cargo landed for further examination. But I did not think it was practicable at Nome at that time, under the circumstances and conditions existing there. The vessel had no spars, or oher means or appliances on her, as other vessels have, by which to haul the cargo out. To have taken the cargo out of the hold of that vessel in the same manner in which it is taken out of other vessels, high derricks or masts would have had to be rigged up. It could have been done. Anybody could have rigged up shears, if they could have gotten two spars. It could have been done. It would have taken, probably three or four days. Labor at Nome at that time was one dollar an hour. I presume it would have taken ten or twelve men to raise that cargo out of the hold to the deck, ready to be discharged into the lighters. This would have cost ten dollars or twelve dollars an hour, independent of lighterage. I suppose you might have taken out twenty or thirty tons an hour. I certainly con-

(Testimony of Albert H. Herriman.)

sidered at that time that the sale, under those circumstances, was for the best interests of all persons concerned, and have no reason since to change my opinion in the matter. At that time I knew that this lighterage plant has been spoken of as belonging to the Nome Beach Lighterage and Transportation Company was there at Nome, and that it was then in the hands of Captain Humphrey; and knowing that, I still considered that it was for the best interests of all parties concerned to sell the cargo on board of the ship as it then was at that time. The reasons are, at that time it was almost impossible for any of us to get lighters enough to supply the ships that we had under contract. We were scraping the beach, and getting every lighter that we possibly could muster to carry out our old contracts. I don't think we would have touched the "Catherine Sudden" under any consideration. At that time, I don't think we could have done it, in the way we were situated. I knew the situation and condition under which Mr. Humphrey held the "Dorothy" and the two lighters that went with her. One was a knocked-down lighter, so there was only one afloat. That lighter would carry from twenty to twenty-five tons.

Q. Let me ask you, Captain, if any particular consignee of that cargo had desired, and had all the facilities, lighters and launches at his disposal to go out to the "Catherine Sudden," and had desired to go out and pick out his particular cargo out of the hold of that vessel, could he, or not, have done it within a reasonable time?

(Testimony of Albert H. Herriman.)

Mr. VAN NESS.—I object to that, because it calls for an expression of opinion in regard to a matter of fact which has to be determined by the jury without any regard to an expression of opinion from this witness.

(This objectioin was overruled, to which ruling defendant then and there excepted.)

A. I do not think, not without authority from the owners of the "Corwin."

Q. We will assume they had the authority of the owners of the "Corwin." Taking into consideration the submerged condition of the vessel, and the manner of the stowage of the cargo, could they have got any particular part of the cargo out within a reasonable time?

A. No, sir. They might have had to handle over half the other cargo before they obtained theirs.

The witness, continuing, testified: They would have to raise to the surface of the vessel all that cargo that was above it, and they would have to search around through the hold of the submerged vessel to find their own. No one knew where it was stowed. These contracts were made in the name of the Pacific Steam Whaling Company. Mr. Humphrey was the general manager, and I superintended the lightering. I received my orders from Mr. Humphrey.

Upon cross-examination the witness testified: I acted as surveyor on that vessel at the written request of Mr. Heustis. He asked two others, Captain Ferguson and the carpenter of the United States vessel "Bear." Before the arrival of the "Sudden," the Pacific Steam Whaling Company had one tow boat and, I think, five lighters.

(Testimony of Albert H. Herriman.)

Prior to the arrival of the "Sudden," a great number of lighterage contracts had been entered into by the Pacific Steam Whaling Company. At about that time we had more lighterage to do then we were able to take care of with the facilities we had. They first discharged the "Corwin" of the lighterage plant towed in by the "Sudden," and then it was turned over to us. I do not know how soon after the arrival of the "Corwin" and "Sudden" at Nome, Captain Humphrey got control of the lighterage plant which had been towed in by the "Corwin" in connection with the "Sudden." It would be almost impossible for me to give you an approximation of the time that it took to discharge the cargo with that plant. It would be owing to how the weather was at that time. I should say, as near as I remember, that the lighterage plant was turned over to me a week, perhaps four days, after the "Corwin" and "Sudden" got there. I cannot tell the time. I don't think it would be less than four days. That is my best recollection. Captain Humphrey came to me and told me: "I have paid $2,500 to redeem this plant that was on the 'Catherine Sudden,' and claimed by the Corwin Company. I want you to take this plant and work it in conjunction with the Pacific Steam Whaling Company, just as you do their own plant." I continued, as the superintendent of the Pacific Steam Whaling Company, to operate this lighterage plant that came up with the "Sudden" until, I think, somewhere about the 20th of July. I was ordered away after that. It would be pretty hard to tell the value of the use of a plant such as this plant that we got from the

(Testimony of Albert H. Herriman.)

"Sudden." You might be working day and night for three days, and then it might be laying idle. With good weather, and smooth beach, in twenty-four hours that one lighter would land one hundred tons. Our charge for lighterage ranged all the way from eight dollars to twelve dollars and fifty cents per ton. The cost of the labor would come to from four dollars and fifty cents to five dollars per ton—I should say five dollars per ton would be a fair estimate of the cost of running the plant. Ten dollars per ton would be a pretty fair average for the use of the lighter. I should judge the net profits would be three dollars a ton. I think the first fortnight, or ten days, the plant was kept pretty steady at work. After that we did not have so much use for it. It would be almost impossible for me to give an estimate of what that plant was doing per day at this time, without some record to go by. I have no way of knowing what the financial arrangements of the company were in any way, shape or manner. The only thing I know is, that the books that passed through my hands of the Nome Beach Lighterage and Transportation Company and the Pacific Steam Whaling Company were kept separate by me, and sent into the office. Outside of that, I know nothing. All we saw of the cargo was simply taking off the hatches and looking down and seeing the cargo, which was immediately below the opening of the hatches. There was not a great deal of the cargo exposed to the eyes of myself and brother surveyors, looking down through the opening of the hatch of that vessel. I do not think there would be over two tons' meas-

(Testimony of Albert H. Herriman.)

urement that would be exposed in each hatch. There were three hatches.

Q. There would not have been, out of that entire cargo, over six tons of the freight on board of that ship that would have been exposed to the view of yourself and fellow surveyors?

A. No, sir; you have got it wrong. I told you the space in the fore hold was open, and that exposed the whole cargo in the fore hold. Going there and looking back, you would see cases, boxes, barrels, some coal, machinery—presumably machinery—and I think some lumber. The boxes and barrels and cases that were there had not been broken up.

Q. If there was any damage at all to that cargo, it was by virtue of the salt water getting inside the cases and damaging what was inside?

A. If a case was damaged, the contents would be, unless water tight.

Q. That would depend upon the character of the goods in the case. For instance, a case of canned peaches, or canned goods of any kind, would not have been injured by the salt water that would possibly have got through, outside of the wooden case, except to the extent of impairing the paper label?

A. You are wrong.

The witness, continuing, testified: The cans are good for nothing after being wet with salt water, unless immediately taken out and washed, or the salt water will eat through the can. I have handled goods that have not been wet with salt water for more than a fortnight,

(Testimony of Albert H. Herriman.)

which were completely gone. I do not know what the character of the goods was. It is pretty hard to tell how much it would have cost to have got a couple of masts and rigged them on the ship, the "Sudden," in such position as to have permitted the getting of cargo out of the hold, so as to lighter it ashore. I know that they lightered the whole of that cargo a week or two later. I do not know how they did it. I might have to pay one hundred dollars for a topsail yard, or two topsail yards, to rig a shear, and I might have to pay one thousand dollars at that time. I might get it for twenty-five dollars. At that time, at Nome, you could not go out and buy masts as you wanted to. You had to get them in the best way you could. You might have to go to a sailing ship and get them. I would not have taken a contract to land that cargo on the beach short of eighteen dollars a ton. Before I could tell how much I would have charged to rig a vessel to get the cargo out of the hold to lighter it ashore, if called upon to do so, I should have first searched where I could have got these masts, and how much they would have cost me. I have given you as fair an answer on that as I could. There is no way of putting a price on what the spars would have cost, or would have cost to get them there. The real basis of my suggestion or recommendation that the cargo be sold, instead of lightering it to the shore, are three: First, the state of the weather at Nome, the liability for a gale of wind to come on at any moment and lose the whole; second, that the cargo had been submerged with salt water, and the longer it stayed there

(Testimony of Albert H. Herriman.)

the more it would deteriorate; third, there was no such thing as warehouse facilities to put that cargo in when it got ashore; no place on the limit—on the beach within the limits of Nome, taking it from Snake river to the Standard Oil Works, where that cargo would have been kept intact. It might have been landed with a boatload here and there. The conditions ashore were such that if it had been landed, with no warehouse to put it in, we would have had to have—I do not know how many men it would have taken to protect that cargo, and to have kept it until it could have been overhauled and another survey made ashore. As I said before, under any other circumstances I should have recommended the ship's cargo to have been landed and warehoused for further survey. But under these conditions, I considered that I did the best thing for the benefit of all concerned, underwriters and owners, and was conscientious about doing it. The cost of lightering the cargo from the vessel to the shore at that time would probably have been about twelve dollars and fifty cents, as near as I can judge. It would have cost about five dollars and fifty cents more per ton to get the cargo out. In figuring it would cost five dollars and fifty cents to get the cargo out, I leave out of consideration the question of what the cost or expense of getting the masts or poles to rig her out would be. That is another consideration. In addition to this cost, I am giving the cost of handling, independent of those considerations.

(Testimony of Theodore P. Colcord.)

THEODORE P. COLCORD, a witness called and sworn for plaintiff, testified as follows:

I am a mariner, shipmaster; have been twenty-five or twenty-seven years, and in nearly all parts of the world, sailing wooden vessels altogether. I was in Nome in the early part of June, 1900. I had cargo on board the "Catherine Sudden" consigned to me personally. I was a stockholder in the Nome Beach Lighterage and Transportation Company, not an officer. When the "Catherine Sudden" came in I was five miles up the beach from town. I came to Nome the next morning. I found that the "Catherine Sudden" had been towed in by the "Corwin" after having been dismantled and waterlogged and abandoned in the ice some one hundred or one hundred and fifty miles away, and that she was there and being held possession of by the Corwin Trading Company. I know Captain Humphrey. Captain Morine was supposed to be the agent of the Nome Beach Company at that time at Nome. He was lying in a very critical condition, just having had an operation for cancer, in a tent on the tundra. I went to see Captain Humphreys. He wanted me to take charge of the lighterage plant for the Nome Beach Company, if I would. I suggested that he take hold of the plant, which, as I understood, was under a mortgage of $2,500. He said: "It is not my business to do anything of that kind, and I have no authority from the Pacific Steam Whaling Company to use their money for any such purpose as lifting the two thousand five hundred dollars from the plant." I told him that, in that case, we, the boys, as

(Testimony of Theodore P. Colcord.)

he called us, some of us would guarantee that amount to the Pacific Steam Whaling Company, if the plant happened to be lost, as Captain Humphrey said it might be to-morrow, if he took hold of it. He said the plant might be lost to-morrow in a gale of wind, and then where would the Whaling Company be for the two thousand five hundred dollars? I told him I would guarantee to the extent of my stock, and some of the others would, which would make the whaling company good for the $2,500. He said "All right; in that case I will take hold of it for the benefit of you boys." Captain Morine was not accessible to anyone except the doctor. The next question that came up was, that the crew were stranded on the beach, and were clamoring for their money, to be paid off. There was no money to pay them. Captain Morine was supposed to have some few hundred dollars in a tin box locked up in Captain Humphrey's safe for safekeeping while he underwent the operation. He had the key to that box. Captain Humphrey wished that I would go and see Captain Morine, if he was able to be seen, and the doctor would allow me to see him, and get that key, if he consented, and see if there was sufficient money in the box to pay the crew off. I did so. He was in a very critical condition and could just speak. I went and told Captain Morine of some of the circumstances; that the ship was there, and had been in trouble, and the crew were on shore and wanted to be paid off, and asked him if he had money enough to pay them off. He said: "The key to that box is in my pants. Get the key and open the box and take the money and pay the

(Testimony of Theodore P. Colcord.)

crew off, if it is sufficient; if it is not sufficient, I do not know what we can do." I took the key to the box, and returned to Captain Humphrey. He opened the box in my presence, and we counted the money. I do not know just how much it was in dollars and cents: He said: "It is not sufficient to pay the crew off. There will be a deficiency here, and I will have to put up that deficiency, and I will do it"; which he did. All the money that was there was used in paying off the crew. Captain Humphrey did not visit Morine. I came to Nome the day after the "Sudden" arrived, and the conversation with Morine in regard to the cash was on the day after my arrival from up the beach. In regard to the pledge of my credit to the extent of my stock for the redemption of the launch from the lien of the salvors, that was the same day, I think. Captain Humphrey obtained possession of the launch and barge, I think, the next day, perhaps the day before the auction. I was present at several conversations betwen Mr. Heustis and Mr. Humphrey in regard to the best way to sell or deliver that cargo of the "Sudden" in a place like Nome. Mr. Heustis said that he claimed that ship and cargo, as far as it went, as their sole property; that he found her in such a condition that she was liable to have gone to the bottom in a minute, almost, and that he towed her in a derelict, abandoned and waterlogged, and that she was his, and the cargo, for their benefit, as there was no court there. He said he supposed it would be proper to advertise the sale at least forty-eight hours previous to having the auction, for the benefit of all concerned, and

(Testimony of Theodore P. Colcord.)

asked me if I would insert, for him, a notice in the daily newspaper to that effect, which I did in one of the Nome daily papers. He insisted that he had the sole right to make the sale, there being no court there. He said he was willing to leave it to the Court to fix the salvage, in case there was one ever came there. He was not willing for the cargo to remain, but the results of the sale. He thought, with everyone else who knew anything of the matter, that the sooner that cargo was disposed of, the better, as it was in bad condition and deteriorating all the time. In those conversations one of his particular points was, like everyone else who was there and knew the condition of affairs, that if he did not sell very quickly, there was liable to come up a gale of wind and strew her along the beach, just the same as in the case of the "Alaska," the week before, and then they would get nothing, no one would get anything. I was present at the sale. Outside of the general public notice, the Alaska Exploration Company were notified that there was to be an auction, and to be there to either buy in or represent their goods. That was the only particular notice was sent out that I know of.,

Q. Did you see any portion of that cargo after it came out of the vessel, and have an opportunity to examine it?

A. Only that part that belonged to myself and a friend; that is all.

The witness, continuing, testified: That cargo consisted chiefly of groceries; some was canned goods, some dried fruit, and flour and sugar, some in bulk and some

(Testimony of Theodore P. Colcord.)

in cans. When it came out, some of it was in as bad condition as it could possibly be, and we threw it overboard, and others we tried to make something of by drying it out in the sun, to see if we could make any use of it whatever. The canned goods were minus the labels and spotted with rust here and there, all over rust and spots. W subsequently used some of the canned goods that we could use. We found a great many of them that were leaking and unfit for use, and had to throw them away. They were leaky as the result of the salt water rust on the same. I should judge about sixty or seventy per cent of the groceries were of no value whatever. At that time Nome was in a great state of excitement, and bustle, and turmoil, but no particular transactions being carried on. There were twenty or twenty-five thousand people landed on the beach with all their goods and effects. There was not much head nor tail to anything. I knew the "Catherine Sudden" before she went on the voyage. I considered her seaworthy. I knew what the the voyage was. We paid the Corwin Trading Company for lifting the goods out of the hold of the ship and landing them on deck. Our cargo was stowed in the aft hold, in the mizzen hatch, on top of everything. I knew where my cargo was, and had made special stowage of it, so it would be easily gotten at. I could put my hand on it in the dark. My particular lot was about five or six tons, and a friend of mine had eight or ten or twelve tons with mine, and we stowed them, his and mine, on the beach together, fifteen or seventeen tons all told. We were alongside the "Catherine Sudden" about four

(Testimony of Theodore P. Colcord.)

hours, getting our fifteen tons. The beach in the immediate vicinity of Nome was full of all sorts of merchandise clear to the ordinary high-water mark. Any large quantity landed at that time would have to be scattered over several miles, and would have required a great force of men to have taken care of it. I think there was a great deal of danger of depredations of cargoes that were not strongly guarded on that beach; a great deal was taken. At that time a dollar an hour was the prevailing wages for men, night or day.

Upon cross-examination the witness testified: The capital stock of the Nome Beach Company was, is, $20,000, I understood. My proportion in the capital stock was one share, $1,000. That was the only interest I had in the adventure. The day the "Sudden" arrived I was about five miles away. I understood the "Sudden" had some coal for account of the Nome Beach Company. I did not know how much. The amount and value of the freight on the "Sudden" for the Nome Beach Company, I was not familiar with. Captain Morine was was furnished by our company with $3,000 in cash, for the purposes of that business. He bought a lot for the Nome Beach Company, to have a landing for its machinery and outfit whenever they should arrive there, some half a mile down from the main part of the town. There was a warehouse built on it. We built it afterwards, I think. I could not say if he built it before the "Sudden" got there. I don't think he did. He had nothing to build it with. I am not prepared to say this was not built before the "Sudden" got there. The lot was, I

(Testimony of Theodore P. Colcord.)

think, about thirty or forty feet wide, and one hundred feet long. I met Captain Panno, and asked him the circumstances of the disaster, but did not have any talk with him, except that, particularly. That was before the sale. I knew Captain Humphrey all my life, nearly.

Q. Are you prepared to state on oath that Captain Humphrey never did see Captain Morine after the "Sudden" got in there and up to the time of that sale?

A. Captain Morine said he had not seen him, and Captain Humphrey said he had not seen him.

The witness, continuing, testified: I asked Captain Humphrey why he could not go and see Captain Morine, and he said he could not stand the sight of a man suffering as he knew Captain Morine must be suffering. I saw the "Corwin" in the stream unloading the day I got there. I saw the steam launch "Dorothy" attending to her, apparently. The steam launch "Dorothy" was the one that went up on the "Sudden." It belonged to the Nome Beach Lighterage and Transportation Company. I should judge it took about two days to unload the "Corwin." The "Dorothy" was they turned over to Captain Humphrey. The auction was held about four days after the arrival of the "Sudden." The lighterage plant was turned over to Captain Humphrey possibly the day before the sale. I would not be positive about that; not earlier than the day before the sale.

Q. State again the arrangement that was made by Captain Humphrey for paying for the salvage services in rescuing the lighterage plant.

A. About his advancing the money?

(Testimony of Theodore P. Colcord.)

Q. Yes.

A. He said he would pay it if we would guarantee, to the extent of our stock, that the Whaling Company would not become a loser in case of a gale of wind coming up and this plant being lost in the meantime, before he had a chance to work out his $2,500.

The witness, continuing, testified: I understood that he drew a draft in favor of the "Corwin" for that $2,500. The other parties besides myself that guaranteed Captain Humphrey to the extent of our stock were two or three of my acquaintances there that had stock of the company, some one share, some two, and some four. Captain Panno was one. He represented one share. Another gentleman, named Mr. Howard, who had four shares, and a man named Dickie, had one share. It strikes me there were one or two more, but I don't know. On the strength of the guarantee he paid the $2,500 and took over the lighterage plant. I did not say anything to Captain Heustis in response to his suggestion, that because he found the vessel derelict, the "Corwin" people were entitled to the whole value of the whole cargo as salvage service. I think Captain Humphrey was present. In response to that sugestion by Mr. Heustis, he thought there was nothing to prevent in Nome, his holding the vessel. He said he had the vessel and cargo, and was going to hold it. I don't remember that Captain Humphrey protested. I do not remember that either I, or he, or anyone else in our presence, at any of these times or conversations, made any suggestion to Mr. Heustis looking towards an arrangement with Mr.

(Testimony of Theodore P. Colcord.)

Heustis for a compensation for salvage at a rate less than the whole cargo. The court was mentioned quite a number of times: that if there had been a court there, he would have left it with the court. I never heard anything of the cargo mentioned. There might have been. I attended the auction sale. The value of the goods I sent up was $600 or $800.I bought them in at the auction sale for $80. I never sold it. I used it for my own benefit, as far as it was of any use to me. I do not think I was on the "Sudden" before the sale, but was on board before I took it out of her. Before the sale, I did not go out to the "Sudden" and look at that cargo at all. I am not sure about that. To get my cargo from the vessel to the beach, I employed one of the Pacific Steam Company's tow boats to take my goods from the side of the "Sudden" and land them up the beach five miles. My goods were taken to the place where I was by the "Mary D. Hume." That was done the very next morning after the sale. The cargo belonging to my friend was also taken up to my place. That gentleman was Mr. Howard, of the firm of Dickie & Howard. His goods were much the same as mine, a general outfit for mining purposes. I think he paid $325 for his. He paid $2.50 a ton to the Corwin Trading Company for lifting it out of the hold of the vessel. I paid the same. They rigged a double-legged derrick to hoist the cargo up to the deck over the hatch. To get our fifteen tons out of the hold of the vessel onto the deck of the ship, and from the deck into the lighter, it took four hours. Up there, they work right through the twenty-four hours, with relays

(Testimony of Theodore P. Colcord.)

of workmen. It was daylight all the time. I presume the Nome Beach Lighterage and Transportation Company still owns the "Dorothy." I do not know positively whether they do or not. I do not know of the "Dorothy" having at any time been sold. I understood when Captain Morine came out he took charge of affairs from Captain Humphrey. Of my cargo, there might have been twenty-five or thirty per cent of it canned goods. Of the whole shipment, I should judge twenty or twenty-five per cent was ruined altogether, so that we threw it overboard. There was sixty to seventy per cent so destroyed by contact with salt water that it could not be used. There was nothing all right, not after it had been in salt water eight days. I tried to use what was left, and made the best of it. I think we made use of as much as forty per cent of that shipment in some way, shape or manner. At the sale the auctioneer read and sold from the manifest. I did not know the Nome Beach Lighterage and Transportation Company's goods were insured. In his conversation with Mr. Humphrey, Mr. Heustis said he had picked this "Catherine Sudden" up derelict and abandoned, and in the ice, and in a sinking condition, and he had towed her in, and he claimed the whole business as his. He insisted upon a present sale. The forty per cent of my cargo which was not thrown overboard was all damaged.

(Testimony of Isaac M. Hibbard.)

ISAAC M. HIBBARD, a witness called and sworn for plaintiff, testified as follows:

I am superintendent of transportation for the Northern Commercial Company, and have been for a year. Previous to that, was traffic manager for the Alaska Exploration Company. Was acting in that capacity at Nome in the spring of 1900. Was in Nome the early part of June, 1900. Our company had some coal on board the "Catherine Sudden," two hundred tons, I think. The value of the coal landed was about $30 a ton. To take it out of the "Catherine Sudden," as she then lay, I should think it would cost pretty near the value. I was offered an opportunity to purchase the coal belonging to the Alaska Exploration Company at that time. I think Captain Humphrey told me that cargo was to be sold, and wanted to know if I wanted to bid at it. I told him no. I stated I thought it would cost as much as it was worth to get it out. I am acquainted with the beach there. Have been going up there since 1898. Storms were likely to come up on that beach at any time. There is no period of guaranteed fine weather that I know of there. Under such circumstances, a vessel lying at anchor about two miles off shore, with no propelling or motive power, would be practically a wreck. If she had no motive power, she could not get away from there. If she was not taken away, she would go ashore.

Upon cross-examination the witness testified:I arrived at Nome on the 15th of June, after the sale of the "Sudden's" cargo. I understood there was to be another sale

(Testimony of Isaac M. Hibbard.)

when I would have an opportunity to buy that coal if I wanted to. I understood the first sale was not to be confirmed. There was no court there to confirm it. The government in that country at that time was entirely in the hands of the revenue officers, who took the place of courts. That conversation with Captain Humphrey was somewhere between the 15th and 18th of June. I did not take the trouble to inquire what my coal had been sold for. I have no idea what the value of coal was in Nome on the 8th of June, the time when the "Sudden" arrived there. I do not know the value of coal there between the first and fifteenth days of June. The price I am putting upon it is between the fifteenth and thirtieth days of June. The cost of lighterage at that time from ship's tackle was ten dollars a ton. If the "Corwin" was, in fact, taking coal out of the hold and putting it onto the lighters at two dollars and fifty cents a ton, I am not aware of that fact. I do not think I was there when the cargo was taken out of the 'Sudden." I left on the 18th, and went over to St. Michael's. We were paying ten dollars a ton, at that time, for any kind of merchandise, from the ship's side to the beach. I do not know what it would have cost to get the cargo out of the hold. I am merely making a guess at it, and I give you this estimate. I do not know whether it would cost two dollars and fifty cents a ton, or twenty-five dollars a ton. Between the 15th of June and the 30th, I did not sell any coal, and I think I did not buy any. I do not know of any considerable lot of coal that was sold during that period. I know of one lot that was

(Testimony of Isaac M. Hibbard.)

bought for seventeen dollars during the last of June, nearly towards the very last. I cannot tell the amount he purchased. I remember it because it was the lowest price I heard it quoted at that year. That struck me as being a very low price. That year the boats got in about the first of June, but the large fleet did not get in until about the 14th. We got in on the 15h, and there were probably ten or twelve big steamers there. I would say, the opening of the season that year was from the 10th to the 15th of June. The prices would not be very high after the steamers got in; not on the 15th, because everything was in by the 15th. It would begin to go down just as soon as the steamers got in, which would be sometime between the 10th and the 15th. I thought seventeen dollars a ton, at the latter end of the month, was a very low price for coal. Cargo is sold both ways, on board and landed. Plenty of people buy it on board and lighter it themselves. The only consideration against making a sale on board would be the expense of what it would cost to get it from the ship to the shore. Merchants up there sell cargoes on board, to be delivered at ship's tackle. That is a common way of selling merchandise up there, coal, lumber and such things. I am quite certain that Captain Humphrey told me, within two or three days of this sale, that there was going to be another sale. At the time of this conversation with Captain Humphrey, we had no lighterage plant. I did not know that the "Corwin" people rigged shears there, for the purpose of getting the coal from the hold of the vessel to the tackle.

(Testimony of Isaac M. Hibbard.)

Upon redirect examination the witness testified: At the time of this conversation with Captain Humphrey, I understood that the whole cargo had been sold. I asked the agent, when I came ashore about our coal on the "Sudden," and he said it had been sold.

ALBERT H. HERRIMAN, recalled for plaintiff, testified: I knew something about the lot that was purchased by Captain Morine up on the beach for the Nome Beach Company. The lot was in the same condition as the rest of the beach, piled full of goods. There was no warehouse on it.

Upon cross-examination the witness testified: I do not know whose goods they were. I would like to know to what authority Mr. Morine would go to, to get the goods moved, if they did not belong to the Nome Beach Lighterage and Transportation Company. I used to try to, and could not do it. He could get nobody to do it. I know nothing more of any actual existing reason why Morine could not have moved those goods, if he wished to do so, than the general reason of the place.

Q. Suppose the "Catherine Sudden" had arrived there under sail, not in tow, and had to discharge her cargo; do you know where Captain Morine would have discharged it?

A. He would have to take his chances, the same as all the rest of us did, where he could find a place to put them on the beach within the three miles limit which the contract calls for.

(Testimony of Albert H. Herriman.)

The witness continuing testified: Between the 8th and the 28th of June we lightered coal from vessels there. I cannot tell you how much.

FRED C. HOWARD, a witness called for plaintiff, being duly sworn, testified as follows:

My business is shipping business. I was at Nome in the early part of June, 1900, when the "Catherine Sudden" came in. I was one of the stockholders of the Nome Beach Company spoken of by Captain Colcord, who went down and pledged his stock to Mr. Humphrey. I had about eleven tons of cargo on the "Catherine Sudden" at that time, and I got some of it. It was all water-soaked, and some of it broken up and rusty. The machinery was all rusted up. I had a gasoline engine, and fifty cases of distillate to run the engine, and a year's supply of groceries for six men, and sluice boxes, and general mining tools, and quite a number of canned goods. The canned goods to me were damaged to the extent of sixty or seventy per cent. I should judge, if I went to sell them, I would not get more than ten per cent of what they were worth. Lots of them I threw overboard right from the ship. The labels were off, and rusty, and before we got a chance to use them a great many of them rusted through and leaked out. The same with the distillate. I was not present at any of the conversations between Mr. Heustis and Mr. Humphrey. I did not have any conversation myself with Mr. Heustis. I did know of Captain Humphrey being in this city and county within a short time preceding the opening of the

(Testimony of Fred C. Howard.)

trial of this case. I came to know it because Mr. Pennell telephoned me, on the 3d of this month, that Captain Humphrey was here, and, as I was pretty well acquainted with him, he would like to have me hunt him up. He told me he was stopping at the Bohemian Club, and I told him that as I had a wedding on hand that day I could not attend to it, but I would look him up next day; and next day I telephoned there, and they notified me that he had been gone three or four days, or a week; that he was probably in Chicago at that time. Mr. Pennell told me that he wanted Captain Humphrey to come up here to court.

Upon cross-examination the witness testified as follows: I am a stockholder in the Nome Beach Lighterage and Transportation Company. I owned three shares in June, 1900. I was at Nome when the "Sudden" arrived there. I had seen Captain Morine after I got there. I arrived on the 2d of June. I think the first time I saw Captain Morine after I got there was the night before the "Sudden" was towed in. I sat up with him all night. That was on the night after the operation. I think the "Sudden" got in on Sunday, the 10th. The "Sudden" got in about noon. I did not see Captain Morine during that day. I didn't see Captain Morine, after this night that I sat up with him, until a month afterwards. As soon as I got my goods I went up the beach to go to work. I got my goods the day after the sale. The "Sudden" got in on Sunday, and they sold the goods on Thursday. I bid in my goods at that sale. The invoice cost of those goods was about $2,000. I bid them in for

(Testimony of Fred C. Howard.)

$325. They bid it up to that price. I don't know who bid it up. I suppose the "Corwin" people bid on them, because they would have the most interest in them. I do not know whether Captain Humphrey bid on them or not. I do not think I had been to the vessel before I attended the sale. I think it was just after the sale. I do not recollect whether I went down there to see what condition my goods were in. I could not find out if I had gone on board. Somebody else bid until it reached a figure near $325, and then I bid $325, and I got them. I was prepared to bid more. I was not willing to go up to $1,000, because I did not have the money to pay for it. I went the size of my pile. These goods were packed as all groceries are packed. Some of them were packed in sacks. The sugar and the flour in sacks, with canvas sacks over it, the same as they ship all Alaska goods. And the dried fruit was in boxes and bags both. I suppose there were forty cases of canned goods out of the lot, or maybe fifty. The value of the canned goods was about ten per cent of the whole invoice, I judge, outside the distillate; and the balance of the cargo, outside of groceries, was in bags and sacks and boxes. The distillate was packed in coal-oil cans. I had fifty cases. I got that all ashore and used it subsequently. Of the fifty cases of distillate I supose ten or twelve leaked out, and the balance was all right. I got the gasoline engine to my place and worked it, and worked my tools and machinery afterwards. It cost me two dollars and fifty cents a ton to get it out of the ship. It cost me five weeks' work, at the end of the season, at one dollar an

(Testimony of Fred C. Howard.)

hour, to lighter it from the ship's side to my place. I did not have the money to lighter it up, and I told Captain Humphrey that we would settle it down here, or I would pay him at the end of the season. At the end of the season he had some coal and lumber and other work he wanted done, to get his place in condition for the winter; and I told him that I would go to work and work that bill out. I did it personally. My men had all gone home. That means seven days to the week, working as long as we could work, as long as it was daylight. At the start we worked ten hours, and at the latter end of the season not more than seven. It was in the month of October and end of September, when the days were shortening very fast. I suppose it was the equivalent of nine hours a day that we put in, and we did that for five weeks. That is about $315, which it cost me to lighter the stuff from the "Catherine Sudden" to my place. There were 11 tons, and it cost thirty dollars a ton. I was able to earn a dollar an hour any place else there that I cared to go to work. I was not compelled to go to work for Captain Humphrey at that time. I made no agreement with him, at the time he lightered the goods, as to how much I was to pay. I boarded myself during this time. I got my passage out from Nome to San Francisco in addition. The passage money at that time was seventy-five dollars. I was all through with my work at that time. I took no interest whatever in what became of the cargo of the "Sudden." I knew I was interested in the cargo, but I did not know that the cargo was insured. My understanding was that

(Testimony of Fred C. Howard.)

it was. I took more interest in my own business than I did in the business of the Nome Beach Lighterage and Transportation Company. I went there to attend to my business. I had no interest in it, outside of my own cargo. Nobody there had any money to put up to take care of anything but their own goods.

H. E. PENNELL, a witness called and sworn for the plaintiff, testified as follows:

"I am the secretary of the Nome Beach Lighterage and Transportation Company. I have knowledge of the details of the affairs of the business of the company done through me. The nature of the business in which this company was employed, or was about to embark upon at the time of this venture, was the transportation of goods from here to Alaska, the lightering of ships from the roadstead of Nome to the beach. The voyage of the "Catherine Sudden" was the initial voyage, the beginning of the enterprise; and the "Catherine Sudden" was purchased by the Nome Beach Lighterage and Transportation Company for the purpose of going into this business, and the business was inaugurated shortly before the sailing of that vessel from this port. The cargo on board of the "Sudden" for the company was a quantity of coal, some supplies for the ship, stores and provisions enough to provision her to bring back a quantity of passengers if we had the opportunity to bring them back, a steam launch. The cargo that we shipped from San Francisco to Nome, some of it was to be put ashore and some of it was to be kept on the ship. That to be put

(Testimony of H. E. Pennell.)

ashore was to provision our men that were in the employ of the lighterage plant.

The witness is here shown a writing, which he identifies as the manifest of the "Catherine Sudden" upon the voyage referred to in the testimony. The manifest contained a statement of the cargo shipped on board by other consignees. The manifest was offered and received in evidence, and was in the words and figures following, to wit:

Plaintiff's Exhibit No. 5.

COASTWISE MANIFEST.

GARDNER & THORNLEY,

Ship and Custom-House Brokers,

322 Washington Street,

San Francisco.

Manifest of the whole cargo on board the Am. "Barkentine" "Catherine Sudden," whereof J. L. Panno is master, burden 515 tons, bound from San Francisco for Cape Nome.

No. of Packages.	Kind of Package and Contents.	Shippers—Residence, San Francisco.	Consignees—Residence, Cape Nome.
2	Tons Egg Coal, J. C. Wilson		E. O. Tuttle.
1	Shovel, Lewis E. Spear & Co.		E. O. Tuttle.
2	Boxes, Lewis E. Spear & Co.		E. O. Tuttle.
2	Tanks, Lewis E. Spear & Co.		E. O. Tuttle.
1	Range, Lewis E. Spear & Co.		E. O. Tuttle.
1	Oven crated, Lewis E. Spear & Co.		E. O. Tuttle.
5	Pcs. Pipe. Lewis E. Spear & Co.		E. O. Tuttle.
2	Stoves, Lewis E. Spear & Co.		E. O. Tuttle.
2	Bales Tents, Ames & Harriss.		E. O. Tuttle.
70	Pcs. Pine, W. A. Boole & Co.		E. O. Tuttle.
16	Tressels, W. A. Boole & Co.		E. O. Tuttle.
28	Bdls. Pine, W. A. Boole & Co.		E. O. Tuttle.
10	Maple Dowles, W. A. Boole & Co.		E. O. Tuttle.
20	Bolts, W. A. Boole & Co.		E. O. Tuttle.
1	Lot Pine 3181 ft., W. A. Boole & Co.		E. O. Tuttle.
1	Bale Dry Goods, Murphy, Grant & Co.		E. O. Tuttle.
28	Pkg. Groceries, Pennell, Suydam Co.		E. O. Tuttle.
13	Bales Meal & Flour, Pennell, Suydam Co.		E. O. Tuttle.

No. of Packages.	Kind of Package and Contents.	Shippers—Residence, San Francisco.	Consignees—Residence, Cape Nome.
21	Pkg. Groceries, Pennell, Suydam Co.		E. O. Tuttle.
2	Bales Tents, Jesse Moore, Hunt & Co.		Hank Somers.
2	Pkg. Tent Poles, Jesse Moore, Hunt & Co.		Hank Somers.
2	Bal. Shovels, Jesse Moore, Hunt & Co.		Hank Somers.
1	Keg nails, Jesse Moore, Hunt & Co.		Hank Somers.
1	Flask Quicksilver, Jesse Moore, Hunt & Co.		Hank Somers.
2	c/s. Hardware, Jesse Moore, Hunt & Co.		Hank Somers.
1	Bal. Awning with poles, Jesse Moore, Hunt & Co.		Hank Somers.
1	c/s. Cigars, Sherwood & Sherwood.		Hank Somers.
1	c/s. Whiskey, Sherwood & Sherwood.		Hank Somers.
10	Bbls. Beer, Sherwood & Sherwood.		Hank Somers.
2	Bx. Chairs, G. H. Fuller Desk Co.		Hank Somers.
26	Pkgs. Lumber, Henry Schwarzchultz.		Henry Schwarzchultz.
9	Bals. Cedar, E. F. Kruze.		Pioneer Western Lumber Co.
2233	Sk. Coal, Geo. Fritch.		Alaska Exploration Co.
6	Bbl. Whiskey, Sam. McCarthy.		Thos. L. Pelletire.
20	Bbl. Whiskey, John Sroufe & Co.		Thos. L. Pelletire.
1	Bbl. Port, John Sroufe & Co.		Thos. L. Pelletire.

No. of Packages.	Kind of Package and Contents.	Shippers—Residence, San Francisco.	Consignees—Residence, Cape Nome.
3½	Bbl. Liquors,	John Sroufe & Co.	Thos. L. Pelletire.
88	Pcs. Mill Work,	Burnham, Stanford & Co.	Thos. L. Pelletire.
1	Pkg. Hdar.,	Burnham, Stanford & Co.	Thos. L. Pelletire.
100	c/s. Distillate,	Standard Oil	Degdon Dyer Co.
1	Bdl. Tools,	J. Caise Co.	Degdon Dyer Co.
1	c/s. Hdw.,	J. Caise Co.	Degdon Dyer Co.
1	Flask Mercury,	J. Caise Co.	Degdon Dyer Co.
2	c/s. Oil,	Hercules Gas Eng. Co.	Degdon Dyer Co.
1	cr. Engine,	Hercules Gas Eng. Co.	Degdon Dyer Co.
1	Bx. Hdw.,	Hercules Gas Eng. Co.	Degdon Dyer Co.
2	Timbers,	Hercules Gas Eng. Co.	Degdon Dyer Co.
1	Cr. Tank,	Hercules Gas Eng. Co.	Degdon Dyer Co.
1	Bx. FlyWheel,	Hercules Gas Eng. Co.	Degdon Dyer Co.
1	Pump & Fittings,	S. F. Tool Wks.	Degdon Dyer Co.
2	Timbers,	S. F. Tool Wks.	Degdon Dyer Co.
7	Lgths. Pipe,	S. F. Tool Wks.	Degdon Dyer Co.
1	Strainer,	S. F. Tool Wks.	Degdon Dyer Co.
1	Cr. Stove,	W. W. Montague & Co.	Degdon Dyer Co.

No. of Packages.	Kind of Package and Contents.	Shippers—Residence, San Francisco.	Consignees—Residence, Cape Nome.
1	c/s. Tin Ware, W. W. Montague & Co.		Degdon Dyer Co.
11	Pkg. Groceries, Pennell, Suydam Co.		Degdon Dyer Co.
1	Pkg. Hdw., Pennell, Suydam Co.		Degdon Dyer Co.
34	Bales Hay, Scott & Magner		T. D. Witherby.
48	Bags Roll. Barley, Scott & Magner		T. D. Witherby.
1	Stove, Lewis E. Spear		T. D. Witherby.
1	Bdl. Pipe, Lewis E. Spear		T. D. Witherby.
1	Scraper Bowl, Hooker & Co.		T. D. Witherby.
1	Bdl. Handles, Hooker & Co.		T. D. Witherby.
1	Wagon Pole, Hooker & Co.		T. D. Witherby.
1	Wagon Axle, Hooker & Co.		T. D. Witherby.
102	c/s. Oil, Ensign & McGuffick		E. M. Dyer.
1	c/s. Compound, Ensign & McGuffick		E. M. Dyer.
1	Safe, Hall Safe Co.		Pioneer Western Lumber Co.
1	Bale. Tent Cover, Neville & Co.		Pioneer Western Lumber Co.
13	Pkg. Wagon and Scraper, H. B. Schindler		Pioneer Western Lumber Co.
23	Bales Hay, W. A. Miller		Pioneer Western Lumber Co.
1	Bx. Hdw., Hooker & Co		Pioneer Western Lumber Co.

No. of Packages.	Kind of Package and Contents.	Shippers—Residence, San Francisco.	Consignees—Residence, Cape Nome.
25	Sx. Barley,	Pioneer West. L. Co.	Pioneer Western Lumber Co.
22	Sx. Oats,	Pioneer West. L. Co.	Pioneer Western Lumber Co.
4	Pc. Pipe,	S. F. Tool Wks.	G. W. Close.
7	Bals. Boards,	S. F. Tool Wks.	G. W. Close.
1	Timber,	S. F. Tool Wks.	G. W. Close.
1	Cr. Oil Stove,	W. W. Montague & Co.	G. W. Close.
1	c/s. Tin Ware,	W. W. Montague & Co.	G. W. Close.
2	Bal. Hdw. & Shovels,	J. Caise & Co.	G. W. Close.
2	Bal. Tent & Poles,	J. Caise & Co.	G. W. Close.
6	Riffles,	G. W. Close	G. W. Close.
16	Pkg. Groceries,	William Peck & Co.	G. W. Close.
3	c/s. Oil,	W. P. Fuller & Co.	G. W. Close.
1	Bx. Engine,	Union Gas Eng. Co.	G. W. Close.
2	Pkg. Tank & Hoops,	Pac. Pump & W. Co	G. W. Close.
2	Pkg. Mch. & Strainer,	S. F. Tool Wks.	G. W. Close.
18	Pcs. Pine,	Simpson L. Co.	G. W. Close.
1	Elbow,	Union Gas Eng. Co.	G. W. Close.
1	Bx. Battery,	Union Gas Eng. Co.	G. W. Close.

No. of Packages.	Kind of Package and Contents.	Shippers—Residence, San Francisco.	Consignees—Residence, Cape Nome.
11	Pkg. Pipe,	J. H. Blakeway	Allen & Fox.
1	Gas Engine,	Allen & Fox	Allen & Fox.
2	Flywheels,	Allen & Fox	Allen & Fox.
1	Wd. Pulley,	Allen & Fox	Allen & Fox.
2	Wd. Rollers,	Allen & Fox	Allen & Fox.
1	Carborator,	Allen & Fox	Allen & Fox.
1	c/s. Battens,	Allen & Fox	Allen & Fox.
26	Pcs. Lumber,	S. F. Lumber Co	Allen & Fox.
12	Pkg. Tin Ware & Groceries,	Smith Cash Store	Allen & Fox.
1	Pkg. Pump & Fittings,	Haslehurst	Allen & Fox.
4	Pkg. Oil & Iron,	Long & Bryce	Allen & Fox.
7	c/s. Oil,	S. Foster & Co	Mrs. L. Quinet.
102	c/s. Oil,	Ensign & McGuffick	A. H. Barber.
676	ft. Lumber,	C. F. Doe & Co	A. H. Barber.
2	c/s. Oil,	S. Foster	R. Tedford.
59	Mill Work,	Burnham-Stanford Co	W. Bontain.
1	Hdw.,	Burnham-Stanford Co	W. Bontain.
3	c/s. Oil,	H. Schwarzschultz	H. Schwarzschultz

No. of Packages.	Kind of Package and Contents.	Shippers—Residence, San Francisco.	Consignees—Residence, Cape Nome.
1	Bx. Paper, H. Schwarzschultz		H. Schwarzschultz
1	Bx. Nails, H. Schwarzschultz		H. Schwarzschultz
200	c/s. Oil, Ensign & McGuffick		Blanch Mining Co.
46	Pkg. Groceries, Ensign & McGuffick		Blanch Mining Co.
118	Pcs. Lumber, Simpson Lumber Co		Noyes, Baker & Yoder.
10	Bales Hay, W. A. Miller		Noyes, Baker & Yoder.
1	Pkg. Pump, Pennell-Suydam Co		Noyes, Baker & Yoder.
29	Pkg. Groceries, Pennell-Suydam Co		Noyes, Baker & Yoder.
2	c/s. Mch. & Valve, S. P. Tool Wks		Noyes, Baker & Yoder.
2	Timbers, S. P. Tool Wks		Noyes, Baker & Yoder.
13	Pcs. Pipe, W. W. Montague & Co		Noyes, Baker & Yoder.
2	Bx. Bolts & Flgs., W. W. Montague & Co		Noyes, Baker & Yoder.
186	c/s. Oil, Union Oil Co		Noyes, Baker & Yoder.
1	Dr. Oil, Union Oil Co		Noyes, Baker & Yoder.
1	Bx. Plates, S. F. Novelty Wks		Noyes, Baker & Yoder.
1	cr. Stove, Holbrook, Merrill & Stetson		Noyes, Baker & Yoder.
1	cr. Oven, Holbrook, Merrill & Stetson		Noyes, Baker & Yoder.
1	Bx. Glassware, Holbrook, Merrill & Stetson		Noyes, Baker & Yoder.

No. of Packages.	Kind of Package and Contents.	Shippers—Residence, San Francisco.	Consignees—Residence, Cape Nome.
1	Bx. Furniture, Holbrook, Merrill & Stetson		Noyes, Baker & Yoder.
20	Pkg. Wagon, Plow & Scraper, Hooker & Co		Noyes, Baker & Yoder.
472	Ft. Lumber, W. A. Boole & Co		J. Tyrell.
59	Pkg. Mdse., J. Tyrrel		J. Tyrell.
1	Keg Wt. Lead, J. Tyrrel		J. Tyrell.
1	Bal. Shovels, J. Tyrrel		J. Tyrell.
1	Bal. Tent Poles, J. Tyrrel		J. Tyrell.
1	Bal. Oars, J. Tyrrel		J. Tyrell.
4	Pkg. Hdw., J. Tyrrel		J. Tyrell.
44	Pk. Lumber, Deneen & Colcord		Deneen & Colcord.
50	c/s. Distillate, Artic Oil Wks		Deneen & Colcord.
40	Pkg. Groceries, Susswan, Wormser & Co		Deneen & Colcord.
2	Cr. Stoves, Holbrook, Merrill & Stetson		E. E. Gould.
1	c/s. Furniture, Holbrook, Merrill & Stetson		E. E. Gould.
1	Pkg. Shovel & axe, Holbrook, Merrill & Stetson		E. E. Gould.
2	Tents, G. McGrath		E. E. Gould.
28	Pkg. Groceries, Olsen & Co		E. E. Gould.
1	Bg. Gro., People's Ex. Co		E. E. Gould.

No. of Packages.	Kind of Package and Contents.	Shippers—Residence, San Francisco.	Consignees—Residence, Cape Nome.
1	Ex. Plate, People's Ex. Co.		E. E. Gould.
3	c/s. Notions, Levi Strauss & Co.		Roke & Anderson.
1	c/s. Cracker, Levi Strauss & Co.		Roke & Anderson.
1	c/s. Hdw., Levi Strauss & Co.		Roke & Anderson.
19	Pkg. Groceries, Levi Strauss & Co.		Roke & Anderson.
113	Bal. Lumber, Blythe & Todd.		Roke & Anderson.
1	Bal. Oars, Blythe & Todd.		Roke & Anderson.
35	Pkg. Groceries, Levi Strauss & Co.		Roke & Anderson.
29	Pkg. Dry Goods, Levi Strauss & Co.		Roke & Anderson.
2	Bdl. Door & Sash, Levi Strauss & Co.		Roke & Anderson.
112	Pcs. Lumber, Simpson Lumber Co.		W. Fox.
3	Pkg. Crockery, W. Fox.		W. Fox.
2	Crate Stoves & Tinware, W. W. Montague & Co.		W. Fox.
4	c/s. Coal Oil, Pennell, Suydem & Co.		W. Fox.
5	Pkg. Doors, Frames & Windows, Pennell, Suydem & Co.		W. Fox.
36	Pkg. Groceries, Pennell, Suydam & Co.		W. Fox.
1	c/s. Wall Paper, S. W. Clark & Co.		W. Fox.
2	Bdl. Tent & Poles, G. W. Shrieve.		W. Fox.

No. of Packages.	Kind of Package and Contents.	Shippers—Residence, San Francisco.	Consignees—Residence, Cape Nome.
1	Bdl. Duck Sheet.,	Ames & Harris	W. Fox.
1	Bx. Nails,	Smith Cash Store	W. Fox.
26	Pkg. Groceries,	Pennell, Suydam & Co	W. Fox.
25	Pcs. Lumber,	Dickey & Howard	Dickey & Howard.
50	c/s. Distillate,	Artic Oil Wks	Dickey & Howard.
13	Pkg. Oil & Hdw.,	Artic Oil Wks	Dickey & Howard.
46	Pkg. Groceries,	Artic Oil Wks	Dickey & Howard.
16	Gas Engine & Fittings,	Union Gas Eng. Co	Dickey & Howard.
88	Sx. Coal,	R. D. Chandler	Alaska Venture Co.
52	Pcs. Lumber,	Sam Haight	Alaska Venture Co.
1	Pcs. Rope,	Madison, Bruce & Sellers	Alaska Venture Co.
2	Anchors,	Madison, Bruce & Sellers	Alaska Venture Co.
½	Bbl. Pitch,	Madison, Bruce & Sellers	Alaska Venture Co.
57	Pkg. Hdw.,	Sam Haight	Alaska Venture Co.
1	Ex. Parts,	Baker & Hamilton	Alaska Venture Co.
1	Ex. Engine,	Baker & Hamilton	Alaska Venture Co.
5	Pkg. Tent & Poles,	Ames & Harris	Alaska Venture Co.
38	Groceries,	M. Ehrman	Alaska Venture Co.

No. of Packages.	Kind of Package and Contents.	Shippers—Residence, San Francisco.	Consignees—Residence, Cape Nome.
23	Groceries, M. Ehrman		Alaska Venture Co.
1	C. I. Hood, Joshua Hendy Mch. Wks		Alaska Venture Co.
25	Pkg. Iron Ware, Joshua Hendy Mch. Works		Alaska Venture Co.
21	Pkg. Iron Ware, Pacific Coast Boiler Wks		Alaska Venture Co.
2	Pkg. Pulley & Rope, M. Burke		Alaska Venture Co.
5	Ex. P. E., People's Ex. Co		Alaska Venture Co.
4840	Ft. Lumber, S. H. Harmon Lumber Co		Alaska Venture Co.
1	Bx. Galv. Pipe, J. H. Blakeman		C. H. Gray.
8	Pcs. Galv. Pipe, J. H. Blakeman		C. H. Gray.
1	Pcs. Galv. Tee, J. H. Blakeman		C. H. Gray.
1	Pkg. Rub. Packing, J. H. Blakeman		C. H. Gray.
108	c/s. Oil, Ensign & McGuffick		C. H. Gray.
1	c/s. Compound, Ensign & McGuffick		C. H. Gray.
3	c/s. Tools, C. H. Gray		C. H. Gray.
1	c/s. Mchry., C. H. Gray		C. H. Gray.
4	Wheels, C. H. Gray		C. H. Gray.
1	Bdls. Poles, C. H. Gray		C. H. Gray.
13	Bdls. Lumber, C. H. Gray		C. H. Gray.

No. of Packages.	Kind of Package and Contents.	Shippers—Residence, San Francisco.	Consignees—Residence, Cape Nome.
1	Engine, C. H. Gray		C. H. Gray.
7	Pcs. Flywheel & Tools, C. H. Gray		C. H. Gray.
1	Wagon K. D., C. H. Gray		C. H. Gray.
1	Pump, C. H. Gray		C. H. Gray.
1	Bx. Parts, C. H. Gray		C. H. Gray.
2	c/s. Chocolate, Nome Beach Light. & Trans. Co.		Nome Beach Light. & Trans. Co.
2	c/s. Jams, Nome Beach Light. & Trans. Co		Nome Beach Light. & Trans. Co.
1	c/s. R. Chicken, Nome Beach Light. & Trans. Co		Nome Beach Light. & Trans. Co.
1	c/s. Tongue, Nome Beach Light. & Trans. Co		Nome Beach Light. & Trans. Co.
5	c/s. Clam Chowder, Nome Beach Light. & Trans. Co		Nome Beach Light. & Trans. Co.
1	c/s. Shrimp, Nome Beach Light. & Trans. Co		Nome Beach Light. & Trans. Co.
1	c/s. Catsup, Nome Beach Light. & Trans. Co		Nome Beach Light. & Trans. Co.
1	c/s. Candles, Nome Beach Light. & Trans. Co		Nome Beach Light. & Trans. Co.
20	Kits Tongue Sound & M'k'l, Nome Beach Light. &Trans. Co.		Nome Beach Light. & Trans. Co.
42	Bx. Dry Fruit, Nome Beach Light. & Trans. Co		Nome Beach Light. & Trans. Co.
1	c/s. Lime Juice, Nome Beach Light. & Trans. Co		Nome Beach Light. & Trans. Co.
2	Tins Matches, Nome Beach Light. & Trans. Co		Nome Beach Light. & Trans. Co.
1	c/s. Salad Oil, Nome Beach Light. & Trans. Co		Nome Beach Light. & Trans. Co.

No. of Packages.	Kind of Package and Contents.	Shippers—Residence, San Francisco.	Consignees—Residence, Cape Nome.
1	c/s. Toilet Paper,	Nome Beach Light & Trans. Co.	Nome Beach Light. & Trans. Co.
11	Kegs Pickels & Kraut,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.
5	Bx. Soap,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.
18	Bll. Beef,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.
2	Bll. Pork,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.
10	c/s. Pie Fruit,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.
40	c/s. Can Goods,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.
10	c/s. C. C. Beef,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.
10	c/s. Salmon,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.
2	c/s. Lard,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.
2	c/s. Onions,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.
1	c/s. Sardines,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.
2	c/s. Sauce,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.
1	c/s. Pearl Barley,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.
11	c/s. Meal,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.
10	c/s. Peas, Sage, Tapioca,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.
7½	Blls. Salmon & Mackeral,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.
6	Bx. Apricots,	Nome Beach Light. & Trans. Co.	Nome Beach Light. & Trans. Co.

No. of Packages.	Kind of Package and Contents.	Shippers—Residence, San Francisco.	Consignees—Residence, Cape Nome.
2	c/s. Mince Meat, Nome Beach Light. & Trans. Co.		Nome Beach Light. & Trans. Co.
11	c/s. Paste, Nome Beach Light. & Trans. Co.		Nome Beach Light. & Trans. Co.
2	c/s. Pickels, Nome Beach Light. & Trans. Co.		Nome Beach Light. & Trans. Co.
10½	Bll. Sugar, Nome Beach Light. & Trans. Co.		Nome Beach Light. & Trans. Co.
8	Kegs Syrup & Molasses, Nome Beach Light. & Trans. Co.		Nome Beach Light. & Trans. Co.
8	Pkg. Liquors, Nome Beach Light. & Trans. Co.		Nome Beach Light. & Trans. Co.
1	c/s. Tobacco, Nome Beach Light. & Trans. Co.		Nome Beach Light. & Trans. Co.
5	Sx. Nuts, Nome Beach Light. & Trans. Co.		Nome Beach Light. & Trans. Co.
1	Bdl. Bags, Nome Beach Light. & Trans. Co.		Nome Beach Light. & Trans. Co.
2½	c/s. Eggs, Nome Beach Light. & Trans. Co.		Nome Beach Light. & Trans. Co.
1	c/s. Eggs, Nome Beach Light. & Trans. Co.		Nome Beach Light. & Trans. Co.
1	Steamer "Dorothy"		
2	Lighters and Gear		
1	Lighter and Gear.		
150	Tons Coal		
6	M. Lumber		
10	Anchors & Chain		

Bond filed Apr. 27, 1900.
(Signed) W. P. WARD,
Bond Clerk.

OATH OF MASTER TO MANIFEST ON CLEARANCE COASTWISE.

District of San Francisco,
Port of San Francisco.

I, J. L. Panno, Master (or commander) of the Bktne. called the "Catherine Sudden" of San Francisco, do swear to the truth of this manifest, and that, to my best knowledge and belief, all the goods, wares and merchandise of foreign growth or manufacture therein contained were legally imported, and the duties thereon have been paid, or secured, according to law.

(Signed) J. L. PANNO,
Master.

Subscribed and sworn to, before me, this Apr. 27, 1900.

(Signed) J. H. CRAIG,
Actg. Deputy Collector.

(Testimony of H. E. Pennell.)

COASTWISE CLEARANCE AND PERMIT.

District of San Francisco,
Port of San Francisco.
Apr. 27. 1900.

J. L. Panno, master of the "Catherine Sudden" of San Francisco, having sworn, as the law directs, to the within manifest, consisting of sundry articles of entry, and delivered a duplicate thereof, permission is hereby granted to the said vessel to proceed to the port of Cape Nome, Alaska Territory.

Given under my hand, at the custom-house at the port aforesaid, the day and year above stated.

(Signed) J. H. CRAIG,
Actg. Deputy Collector.
(Signed) E. U. MASLIN,
Deputy Naval Officer.

The witness continuing testified: The lumber shown upon the manifest consigned to the Nome Beach L. & T. Co. was a miscellaneous lot of lumber connected with a little house we had, which was called a knock-down house, which we intended to put up as an office building and the residence of Capt. Morine, and that would practically make all of 6,000 feet. There were some few pieces of plank for ordinary use, and there were some square timber in it, a few pieces of square timber that we could cut up into buoys, cut up into square blocks for the purpose of mooring buoys and things of that kind to mark an anchor or mark a mooring. This knock-down house that

(Testimony of H. E. Pennell.)

I refer to was one of a type that was being built in Oakland by an institution over there that made a specialty at that time of building little knock-down houses to sell to people who were going up into that part of the country where it was known that a house of that kind would be wanted. They were little houses, consisting of from two to four rooms, built in panels and put up by bolts. They could be knocked down readily. They run on a single studding, and were built of tongue and grooved lumber. They build them in mining countries now. These knock-down houses are not lumber, properly speaking, but they are sawed, fitted, and everything ready to put together as a house. The loss of any part of it would make it absolutely necessary to replace that part which was lost, to make a complete house. In other words, some of it was a house, and some of it would be in miscellaneous lumber within the term 'lumber.' All the lumber that was aboard there had fitted in somewhere in connection with our business. It was not a merchantable shipment of lumber. It was not the kind of lumber that would find a market. It was not sent there for that purpose. It was fitted for a special purpose, all the lumber aboard for the Nome Beach Company. We sent Captain Morine up there as an agent.

The witness here identifies a paper shown him by counsel as the power of attorney given by the Nome Beach Lighterage and Transportation Company to Captain Morine to represent it in Nome, Alaska; which paper was filed and read in evidence, and was as follows:

(Testimony of H. E. Pennell.)

Plaintiff's Exhibit No. 6.

Know all men by these presents: That Nome Beach Lighterage and Transportation Company, a corporation duly incorporated under the laws of the State of California have made, constituted and appointed, and by these presents do make, constitute and appoint Edgar S. Morine of the city and County of San Francisco, State of California our true and lawful attorney for us and in our name, place and stead, and for our use and benefit for all purposes in the territory of Alaska to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, acounts, legacies, bequests, interests, dividends, annuities and demands whatsoever, as are now or shall hereafter become due, owing, payable or belonging to us and have, use and take all lawful ways and means in our name, or otherwise, for the recovery thereof by attachment, arrest, distress or otherwise, and to compromise and agree for the same, and acquittances or other sufficient discharges for the same, for us and in our name, to make, seal and deliver, to bargain, contract, agree for, purchase, receive and take lands, tenements, hereditaments and accept the seizen and possession of all lands, and all deeds and other assurances, in the law therefor, and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate lands, tenements and hereditaments upon such terms and conditions, and under such covenants as he shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner, deal in and with goods,

(Testimony of H. E. Pennell.)

wares and merchandise, choses in action, and other property in possession or in action, and to make, do and transact all and every kind of business of what nature and kind soever, and also for us and in our name, and as our act and deed to sign, seal execute, deliver and acknowledge such deeds, leases and assignments of leases covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter-parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgage, judgments and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises.

Giving and granting unto him, said attorney, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as we might or could do if personally present hereby ratifying and confirming all that our said attorney shall lawfully do or cause to be done by virtue of these presents.

In witness whereof, we have hereunto set our hand and seal the 21st day of April, one thousand nine hundred (1900.)

Signed, sealed and delivered in the presence of:

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY, [Seal]

[Seal] By E. T. KRUSE, [Seal]
President.

H. E. PENNELL, [Seal]
Secretary.

(Testimony of H. E. Pennell.)

State of California,
City and County of San Francisco. }

On the twenty-first day of April, A. D. one thousand nine hundred, before me, James L. King, a notary public in and for said city and county, residing therein, duly commissioned and qualified, personally appeared E. T. Kruse known to me to be the president, and H. E. Pennell known to me to be the secretary of Nome Beach Lighterage and Transportation Company, the corporation described in and that executed the annexed instrument, and they duly acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco the day and year last above written.

[Seal] (Signed) JAMES L. KING,
Notary Public in and for the City and County of San Francisco, State of California, 308 California St., San Francisco.

[Three revenue stamps on margin.]

The witness continuing testified: There was not any other or further power given to Mr. Morine other than is expressed in this document. That is all the power he had in connection with it. His agency or his power was embodied in that document. We gave him funds to take up with him, I think the round amount $3,000 in currency. Our company did not have any connection at Nome, during the month of June, with anybody else, or any other firms, by which it could establish a credit or have a credit

(Testimony of H. E. Pennell.)

at Nome. The Nome Beach Company was organized perhaps six weeks to two months prior to the sailing of that vessel from San Francisco. That was sometime in May. I think we were organized probably in March prior to that. The beginning of our business venture was the sending off of this cargo and this vessel. After the loss had occurred, and news came to San Francisco concerning it, we sought out the parties with whom we had insured, and found them about as well informed as ourselves in regard to the loss of the vessel. We discussed the matter with them, and asked what was requisite for us to do under the circumstances: that our property was a wreck, and we had met a loss which we presumed we were insured against; we asked what mode of procedure they wished us to take in order to get our insurance money, for we wanted the insurance money, and all we wanted to know was the proper form to make our demand in on them, the insurers of this cargo. We were told it was necessary to make proofs of loss, and we were asked for such information as we could give or could get. We gave such information as we had, and afterwards sought further information that we had not at that time, and from time to time brought it to them and made them aware of the facts as they came to our knowledge, and continued to request that they pay us our insurance money.

Q. Did you have any conversations with Mr. Davis, the manager of this company, concerning the payment of the loss and the amount? A. I did; yes, sir.

(Testimony of H. E. Pennell.)

The witness continuing testified: I had those conversations with Mr. Davis from time to time in the way I have stated, telling him of the loss and asking him as to the mode of collecting under the policy, and as the different information was furnished and considered by Mr. Davis I continued, of course, on behalf of the company, to demand our insurance money. In response to this demand I was informed by Mr. Davis that he considered the demand of my company just, and that in all fairness we should receive our money under the policy. Then I asked him why he did not pay it. He said that he would like to pay it, and would pay it, if it were not for the fact that he had reinsured a certain amount of the risk that he carried, and if he paid the amount of our policy he would have in some way to get it from the reinsurers, for they had given him to understand that if he paid it they would not pay him; and he said that he did not want to be out his money, as he would have to be, until he would, perhaps, have to sue his reinsurers to get his money, and while he felt that we should have it justly, for this reason he could not pay it.

Mr. VAN NESS.—If your Honor please, we move that all of the witness' statement, commencing with the words "In response to this demand I was informed by Mr. Davis," and after the witness proceeds to state that Mr. Davis said to him he considered the demands just, etc., be stricken out as immaterial, irrelevant and incompetent upon any of the issues in the case.

(Testimony of H. E. Pennell.)

The COURT.—I am not clear in my mind as to whether this statement made by Mr. Davis binds his company or not. I much prefer to let the matter go now, and I will consider it later.

Mr. VAN NESS.—We will reserve an exception to the refusal of the Court to strike out the testimony.

The COURT.—Very well. You are not satisfied with my offer, Mr. Van Ness, to consider the matter hereafter?

Mr. VAN NESS.—No.

The COURT.—Then I will deny the motion. The record will show that I offered to consider the matter later.

Mr. VAN NESS.—I do not question that, but I prefer to have a proper exception in the record at this time. Later on, if your Honor considers it again, and comes to a different conclusion, we can strike it out.

The COURT.—I will not consider it further.

Mr. VAN NESS.—Very well. We will take an exception now.

The COURT.—I say now, I still have some doubts as to the admission of that testimony.

The witness continuing testified: No part of this cargo, nor any part of the proceeds of the cargo, ever came to the possession of our company. I am not now referring to the lighter and the "Dorothy." I am referring to this coal and merchandise and so on, that was on board the "Sudden." It was entirely lost to our company. I received word from Nome to the effect that a draft had been

(Testimony of H. E. Pennell.)

drawn on my company for $2,500. The draft came and we paid it. June 29th, 1900, the Nome Beach Company paid that draft in San Francisco. Subsequent to the loss I received a report from Morine, from Nome, respecting the loss. There were two reports, one from the North and one written statement made up by him on his deathbed here. I do not remember the purpose of the date stamped in blue, "July 19th, 1900," whether of its being received or being answered.

The first report was here offered and read in evidence, and is in the words and figures following, to wit:

Cape Nome, June 24/19.

Nome Beach Lighterage & Trans. Co.

Gentlemen: As As Capt. Humphrey has informed you of the loss of the "Catherine Sudden," no doubt you will receive his advise before this, I cannot find words to express my feelings concerning the matter, as I had built so much upon her safe arrival. On my arrival here I found everything so different to what I expected. There were no locations on the beach to be had unless you paid an exorbitant price. Capt. Humphries secured a lot on the beach 30x70, the tide will cover it when high. As we had arranged on the passage up to work together, I applied to Lieut. Craigie for a strip adjoining the Whaling Co., 10x70, the price to be 500 00-100. I left them to draw up the papers for the lot. I was away a couple of hours; on my return they sprung the price to 750 00-100, and as they concluded that I was badly in want of the lot, they tried me for 1000.00. I called the deal off and went down

(Testimony of H. E. Pennell.)

the beach about half a mile and purchased a lot 41x110 for 1500 00-100, where there is a good water frontage. I then took the Whaling Co., on with me, they put up their tents and got their plant down so as to hold the lot, as I dare not leave the place alone for any time, if so, it would have been jumped. I have sold the Whaling Co. an undivided half of the property. The "Sudden" having met with disaster left me without tents or anything, and to cap the climax I was compelled to have an operation on my neck. On the passage up I contracted a severe cold which settled in my throat, causing it to develop into a fearful condition. I should have had it operated on sooner, but the Dr. had no place to perform the operation in. I had to get some lumber and put up a place. I noticed in looking over a copy of a letter written to you by Capt. Humphries that the Dr. had removed three cancers from my throat, he was mistaken, as they were not cancers, but glandular tumors, but the operaton was very critical, and I think a success. I am so as I can get about when the weather is fine. On finding that I had to be confined, I talked the matter over with Capt. Humphries, Capt. Colcord and other friends, and we decided that there was no time to be lost. Capt. Humphries very offered to look after all of my business for me on arrival of the "Sudden," which he has done to my satisfaction, and I trust to yours also. While I was in the worst condition the "Sudden" arrived a total wreck, having gotten into the ice, and in trying to work her out the bow port was stove in and she filled. They succeeded in getting

(Testimony of H. E. Pennell.)

the launch, two surf boats, lighter and the most of the knock-down lighter off, also some rope. The "Corwin" got her pumps to work on the ship, and after pumping three days, got her pumped out. Capt. Panno made a contract with the "S. S. Corwin" to tow the launch and lighters to Cape Nome for 2500 00-100, lighter and launch to discharge the "Corwin," which they did in one night. Capt. Humphries, like myself, coming up here with very little money, was compelled to draw on you for the 2500.00, which I trust you had money enough on hand to meet. Capt. Humphries has been keeping the boat and lighter employed constantly and we have about 1000.09 to our credit now. Surf boats are not suitable for the beach, lighters are the only thing. The Whaling Co. are about to sell their plant to Lane for 20,000. I will close out if I can get my price. I hold our plant at 20,000. In the mean time the launch and lighters are turning over good money, putting up the knock-down lighter cost me considerable, as so much of the planking bits, etc., were missing. Three days work will square her up. The "Sudden" and the cargo was sold for about $9000. Nobody had any money to bid for goods. The sale and every part of the business was disposed of before I had any knowledge of the disaster, as nobody was allowed to see me for five days, and a few days after Capt. Humphries came and disclosed the business to me, I can assure you that it was a great blow to me, as I had planned on such good results. I had to purchase from the "Corwin" the mushrooms, also other gear belonging to the outfit. The

(Testimony of H. E. Pennell.)

worst part of it is I cannot get any mooring chains, they having thrown ours off the "Sudden" to lighten her. I am rather shaky yet and find it very hard to settle down to letter writing. I will advise you as I go along. I would very much like to hear from you. I have not received any word from you to date. What insurance have we on ship and supplies? How are you financially at that end? What do you think about closing out the business here? I have paid off all our contract men with the exception of Capt. Simmie and engineer, and McNicholas, he is now laid up with a lame leg. I will let him go as soon as he can get out.

Yours respectfully,

E. S. MORINE.

When I received the first news of the loss, there was a meeting of the board of directors had with respect to it.

The witness was here shown a book, which he identified as the minute book of both the stockholders' minutes and director's minutes of the Nome Beach Lighterage and Transportation Company.

The witness continuing testified: Upon page 82 of this book, under date of June 22, 1900, these are the minutes of the special meeting of the board of directors of the Nome Beach Lighterage and Transportation Company, held that day.

Counsel for defendant here objected to the reading in evidence of the minutes and letter which followed the minutes, on the ground that they were all subsequent to the dates of the transactions at Nome, which enter into

(Testimony of H. E. Pennell.)

these matters; and upon he further ground that at the time the minutes were made and the letter was written it appeared upon the face of the proceeding and upon the face of the letter that the company here was without knowledge of the arrival of the "Sudden" at Nome or anything that had taken place outside of the immediate disaster in the Behring Sea; and on the ground that they and each of them were irrelevant, immaterial and incompetent and hearsay.

The Court overruled the objection, and counsel for defendant took an exception.

The minutes and letter were as follows:

June 22, 1900.

Special Meeting Board of Directors of the Nome Beach Lighterage and Transportation Company, held at the office of Mr. E. T. Kruse, 207 Front Street, City and County of San Francisco, State of California, June 22nd, 1900. Meeting convened at 3:45 o'clock P. M. pursuant to call by the President, Mr. E. T. Kruse.

There were present Directors E. T. Kruse, H. B. Madison, W. E. Balcom, H. E. Pennell.

Absent Director J. B. Dyer.

News having been received that this Company's vessel, the Barkentine "Catherine Sudden," had met with a disaster and might at this time be lost or in a disabled condition at Nome, upon motion the Secretary was instructed to write a letter of encouragement to Superintendent E. S. Morine, at Nome, telling him that the Directors looked solely to him, and that whatever the conditions

(Testimony of H. E. Pennell.)

might be, he was to use his own best judgment for all parties concerned, and that a copy of said letter be attached to and become a part of these minutes.

San Francisco, Cal., June 22, 1900.

Capt. E. S. Morine, Nome, Alaska.

Dear Sir: We have had bad news from the "Catherine Sudden." The reports, however, are conflicting, some saying that the vessel is all right except that she is dismasted and proceeding under jury rig, while others go as far as to say she has been stove in and abandoned. We have hopes however that if the vessel is in distress the same is not so serious as reported, and that she will turn up at Nome with her deck load and cargo safe.

In any event, we wish to notify you that the Directors of the Nome Beach Lighterage and Transportation Company have held a meeting and authorized this letter. Let the circumstances be what they may, the Directors have full confidence in you to do what is for the best interest of the Company, and wish you to understand that although there are a number of stockholders of the Company at Nome, you are the person in authority and the one looked to to use his judgment for the best interests of all concerned.

If the mishap is as bad as reported, we are very sorry for all concerned. The next thing to be done is to make the best of the circumstances. You have the Company's power of attorney, have authority to conduct the business of the Company and vessel, and again we wish to impress upon your mind that the Directors have full confidence in you as their manager.

(Testimony of H. E. Pennell.)

Send us detailed reports from time to time as often as possible. The field of action being so far away, your Directors will be governed in a great measure in their actions by your reports.

Wishing you and all our people good luck and hoping this finds you all well, we remain,

Yours very truly,

NOME BEACH LIGHTERAGE & TRANSPORTATION CO.,

By H. E. PENNELL,

Secy.

The witness continuing testified: When we received the first news of the loss there was a meeting of the board of directors had with respect to it.

The witness here produced a list, and testified that it contained the minutes of the special meeting of the board of directors of the Nome Beach Lighterage and Transportation Company held June 22d, 1900.

Counsel for plaintiff offered to read said record.

Counsel for defendant objected to the minutes and the letter following the minutes addressed to Captain Morine, on the ground that they were all subsequent to the dates of the transactions at Nome which entered into those matters, and upon the further ground that, at the time those minutes were made and that letter was written, it appeared upon the face of the proceedings and upon the face of the letter that the company here was without knowledge of the arrival of the "Sudden" at Nome, or of anything that had taken place outside of the immediate disaster in the Behring Sea, and upon

(Testimony of H. E. Pennell.)

the further ground that the minutes and letter were each irrelevant, immaterial, incompetent and hearsay.

The Court overruled the objection, to which ruling defendant then and there excepted.

Said minutes and the said letter were thereupon read in evidence, and were as follows:

Jun. 22, 1900.

Special Meeting Board of Directors of the Nome Beach Lighterage and Transportation Company, Held at the office of Mr. E. T. Kruse, 207 Front Street, City and County of San Francisco, State of California, June 22nd, 1900. Meeting convened at 3:45 o'clock P. M. pursuant to call by the President, Mr. E. T. Kruse.

There were present Directors E. T. Kruse, H. B. Madison, W. E. Balcom, H. E. Pennell.

Absent Director J. B. Dyer.

News having been recved that his Company's vessel, the Barkentine Catherine Sudden, had met with a disaster and might at this time be lost or in a disabled condition at Nome, upon motion the Secretary was instructed to write a letter of encouragment to Superintendent E. S. Morine, at Nome, telling him that the Directors looked solely to him, and that whatever the conditions might be, he was to use his own best judgment for all parties concerned, and that a copy of said letter be attached to and become a part of these minutes.

San Francisco, Cal., June 22, 1900.

Capt. E. S. Morine, Nome, Alaska.

Dear Sir: We have had had news from the "Catherine Sudden." The reports however are conflicting, some

(Testimony of H. E. Pennell.)

saying that the vessel is all right except that she is dismasted and proceeding under jury rig, while others go as far as to say she has been stove in and abandoned. We have hopes that if the vessel is in distress the same is not so serious as reported, and that she will still turn up at Nome with her deck load and cargo safe.

In any event we wish to notify you that the Directors of the Nome Beach Lighterage and Transportation Company have held a meeting and authorized this letter. Let the circumstances be what they may, the Directors have full confidence in you to do what is for the best interests of the Company, and wish you to understand that although there are a number of stockholders of the Company at Nome, you are the person in authority and the one looked to to use his judgment for the best interests of all concerned.

If the mishap is as bad as reported, we are very sorry for all concerned. The next thing to be done is to make the best of the circumstances. You have the Company's power of attorney have authority to conduct the business of the Company and vessel, and again we wish to impress upon your mind that the Directors have full confidence in you as their manager.

Send us detailed reports from time to time as often as possible. The field of action being so far away, your Directors will be governed in a great measure in their actions by your reports.

(Testimony of H. E. Pennell.)

Wishing you and all our people good luck and hoping this finds you all well, we remain,

Yours very truly,

NOME BEACH LIGHTERAGE & TRANSPORTATION CO., By H. E. Pennell, Secy.

Q. Was that letter mailed to Mr. Morine?

A. It was.

Q. This letter, Exhibit 7, speaks of a letter addressed to you by Captain Humphrey. Did you receive such a letter?

A. I received a letter from Captain Humphrey which I presume that refers to, yes.

Q. I show you a letter addressed to you by Omar J. Humphrey under date of June 11th, 1900, and ask you if that is the letter? A. That is the letter.

The said letter was read in evidence, and was as follows: Nome, Alaska, June 11, 1900.

Mr. H. E. Pennell, Secy. Nome Beach L. & T. Co., San Francisco, Cal.

Dear Sir: I have this day, as agent of E. S. Morine of the Nome Beach L. & T. Co., duly appointed by him by power of attorney which is duly signed, sealed and delivered, drawn on you as Secy. of the Nome Beach L. & T. Co., for the sum of twenty-five hundred dollars, in favor of the Pacific Steam Whaling Co. In explanation of this will say that Captain Morine was taken sick on his arrival here and has had an operation performed on the glands of the throat from which three cancers have been taken. Previous to his being operated upon he appointed me as his agent, and so far as I am able will

(Testimony of H. E. Pennell.)

faithfully carry out this trust, said appointment being made upon the advice of Capt. Colcord, Mr. Dickey and Mr. Howard, who are stockholders in your Company. While Capt. Morine is doing very well at the present time, the operation being considered successful, he is still in a very precarious condition.

The "Catherine Sudden" on June 3rd had her bow ports stove by striking the ice and commenced to sink and was abandoned; the steamer "Corwin" picked her up and brought her to this port, arriving last evening. The ship, at time of abandonment, was full of water and wholly dismasted, and the crew on the ice.

The "Corwin" with the aid of her passengers and crew pumped the "Catherine Sudden" out and brought her to this port. A survey has been held on her this day by the Capt. of the "Corwin," said survey consisting of Capt. A. H. Herriman, Capt. W. H. Ferguson and the carpenter of the U. S. Revenue Cutter "Bear," and the said vessel has been condemned. The Capt. of the "Corwin" proposes to sell the cargo, which is wholly damaged, as per consignments according to manifest, also the vessel's hull. The advice for so doing by the Master and owners of the "Corwin" was from Capt. Tuttle of the U. S. Revenue Cutter "Bear," and considered for the best interests of all parties concerned.

Capt. Panno, by agreement duly signed with the Master and owners of the "Corwin," agreed to pay the sum of $2,500, U. S. coin, for the delivery of the launch, lighter and two surf boats at Nome, which contract has

(Testimony of H. E. Pennell.)

been carried out by the Master and owners of the "Corwin."

The Master and owners of the "Corwin" demand that the $2500 must be paid, or they will hold the launch and lighters, hence as agent of your Company I have drawn draft on you for this amount, payable to the Pacific Steam Whaling Co. and have drawn draft in favor of the Master and owners of the "Corwin" on the Pacific Steam Whaling Co., as a draft on the Nome Beach L. & T. Co. could not be cashed in this place, and I trust that you will honor my draft on you on presentation. I shall hold lighters and launch until advice from our office that said draft has been paid; in the meantime will keep them employed as much as possible placing their earnings at the credit of the Nome Beach L. & T. Co., and hope to wipe out this indebtedness in a very short time, but have drawn this draft on you as I, representing the Pacific Steam Whaling Co., will not assume any responsibility as to the safety of the launch or lighters, but will endeavor to the best of my ability, to protect them from any damage or loss.

Trusting my action in this matter will be approved by the Nome Beach L. & T. Co., I remain,

Yours very respectfully,

OMAR J. HUMPHREY,

Agt. N. B. L. & T. Co.

P. S. Enclosed please find copy of protest made by Capt. Panno.

The witness continuing testified: The next report that I received from Morine was under date of July 2d.

(Testimony of H. E. Pennell.)

The witness here produced the letter last referred to. Said letter was read in evidence, and was as follows:

Plaintiff's Exhibit No. 9.

"Nome, July 2/19.

N. B. L. & T. C., San Francisco.

Gentlemen: I herewith enclose you a statement informing you about how we are progressing. Everything is going along very satisfactory. We are getting our share of the work. I am working with the P. S. W. Co. We have an office at present in C. H. Hamilton & Co. building, but as Kitson and Capt. Humphrys had some words yesterday, Humphrys is done with him. He pulled Kitson through his trouble. Kitson was up here with no outfit to do his work, and we worked in with him and put him on velvet, which I think he will soon drop from. I will have a building on our lot in four days 25x26. I am fitting up an office for the Whaling Co. and myself and departments for Capt. Humphrys, Capt. Herriman and myself. I will rent four rooms which will give us a good revenue. There are a great many here in the lighterage business, and I understand that they are cutting the rates. We are holding our rates up. I would rather get less work at our rates as it is much easier on our plant. Capt. Humphrys' bookkeeper is doing the work for both of us, we paying a pro rata. I have three men under wages; they are on the "Dorothy." Capt. Panno I have settled with. McNicholas hurt his leg very bad and is under the Dr. hands, as soon as he is able to get about, I will let him out.

(Testimony of H. E. Pennell.)

Other help I engage as required, which is expensive, one dollar per hour. I arrange most of my contracts lump sum for lighters, parties hiring them paying all help. I experimented yesterday on ballasting ships at $8 per ton on the Sch. "Coleman." It proved successful, as I put 40 tons on one of our lighters, and in seven hours cleared $200, besides $50 for the tow boat. We tried to work a combination on the towage and lighterage but it proved a failure. Capt. Humphrys and I did not want it. Capt. Johnson contracted with the Gov. to discharge 12,000 tons of freight at Nome River for I understand six dollars per ton. It is understood that Johnson cannot carry out his contract, as he finds, like a great many others, that his plant is no good. I think that the business will come our way; if so, it will give us lots of work, and we can handle the job better than any outfit here. We have talked with the officer in command this A. M. He told us that he would call for bids and would keep us posted, and for us not to put in our bid until all others were in, and they would keep us posted and advise us how to act. I am getting so as I can get about when the weather is fine, but my face is in a bad condition yet. If only the accident had not occurred to the "Sudden," we would have made a fine clean up as we had the best plant of any. The surf boats don't amount to much, but I am working them in on a great many jobs. I would very much like to know whether you placed any insurance on our outfit beside the hull. There has been some funny business done concerning the disposal of the "Sudden" and cargo. Mr.

(Testimony of H. E. Pennell.)

Bunker's ship has not arrived yet. We will look after the Capt. when he arrives. The tug that the P. S. W. Co. sold to Lane got on the bar off the beach the night of the 29th, stove her bottom in, and is now lying full of water. They soon used her up, and she was a very nice boat. Mr. Stone gave us a very inferior boat for the price paid, that is, she is not strong enough. Strength is what counts up here. Providing I don't close out the plant, I will make some changes on the boat this winter, that is, if I remain in. If I don't close out, it will be necessary for some one to remain here so as to have the plant in good condition next spring, as the boats can be ready to operate by the time any ships arrive. This is a wonderful camp and is building up very rapidly. Prices on lumber keep up and fluctuate from $50 per M to $95. I have been very much handicapped by my sickness and the loss of the "Sudden." If I had not had Capt. Humphreys here, I would have lost every thing, and we must certainly recompense him for his kindness. He tells me there is no charge for his services, but I am not satisfied with that, and I feel that you will take my view of the matter. You will please forward me a statement advising the amount of insurance carried also the amount you advanced to Capt. Simmie's wife and engineer W. Neal. Don't advance any money to McNicholas' wife as I am through with him. I will keep you posted in the future concerning the business. Dyer is making money. Tell Capt. Simpson that we will not be out any money.

Yours truly,

E. S. MORINE.

(Testimony of H. E. Pennell.)

The witness continuing testified: I made a reply to the letter of Captain Humphrey under date of June 11th, wherein he advised me of advancing $2,500, drawing on me and telling me what had occurred. I answered the letter and acknowledged the receipt of it. Simply a personal letter. I cannot remember what the contents of that letter was. So far as I remember, it was a letter acknowledging the receipt of his letter, advising him that without doubt the Nome Beach Lighterage and Transportation Company would honor his draft, and thanking him for the services he said he had rendered to the company and on behalf of Captain Morine; and so far as my memory serves me, that is the gist of the letter. I can support that by reasons for such a letter if required. Subsequent to that I received another communication from Captain Morine on the 18th of July.

The witness here produced a letter, which was offered and read in evidence, and is in the words and figures following, to wit:

Nome City, July 18, 1900.

N. B. L. & T. Co., San Francisco.

Gentlemen: I herewith enclose you a few lines sending the same by the S. S. "Newsboy," as she may arrive before I do. Mr. Benns and I leave to-morrow evening on the "Cleveland." I leave Mr. Dyer in charge. I have Capt. Herriman and Capt. Herbert with him. They are both good men. Business at present is very dull but I am getting my share of it. I have not obtained a settlement with Capt. Humphreys to date. He is so changeable that it is a difficult job to get a state-

(Testimony of H. E. Pennell.)

ment. I have been running things myself for two weeks and find it very much more satisfactory. Capt. Humphreys had purchased a lot next to ours and has a large building about completed on it. I will explain all matters on arrival.

Yours truly,

E. S. MORINE.

Q. Did Captain Morine make a report to you on his arrival?

A. He did. He made a written report in the hospital.

Q. Have you that?

A. Yes, sir, I have it.

The witness here produced the report referred to in his last answer, and said report was offered in evidence.

To the introduction of this report counsel for defendant objected upon the ground that it was irrelevant, immaterial and incompetent.

The objection was overruled; to which ruling defendant then and there excepted.

Said report was read in evidence, and was as follows:

Plaintiff's Exhibit No. 11.

San Francisco, Aug. 4, 1900.

Statement of E. S. Morine's from June 5th, 1900, to July 23, 1900, as Supt. of the Nome Beach Lighterage & Transportation Co.

I arrived at Nome, Alaska, May 28, 1900. Cash in hand, $3,000.00. Bought a business lot June 1st, paid $1,500.00 cash for same; put about $200.00 improvements

(Testimony of H. E. Pennell.)

on lot. On June 2nd, agreed to allow Mr. Humphrey "as manager of the Pacific Whaling Co.," to share lot with me, & at once he proceeded to erect his warehouse & discharge his ships. On June 6th I transferred an undivided half of lot to him, he to pay one-half of the entire cost of lot to date, although he did not pay over one dollar. On the same day I turned over the management of the N. B. L. & T. Co. to him, giving him my full power of attorney, he agreeing to take charge of the same without any charge. On June 7th had operation performed. On June 10 "Catherine Sudden" arrived a total wreck and in tow of the Steamer "Corwin." She also had in tow the tug "Dorothy" and lighters, "Corwin" holding the "Sudden" for salvage. Captain of the "Sudden" contracted with the "Corwin" to tow "Dorothy" and lighters in for the sum of $2,500.00, & to lighter the "Corwin's" freight. The tug "Dorothy" proceeded at once to lighter the "Corwin," Captain Humphry paying the "Corwin" $2,500.00 towage, taking a draft on the Nome Beach L. & T. Co. indorsed by Howard, Dickey and Colcord. The "Corwin" people at once advertised & sold the "Sudden" & cargo at auction. Do not know who authorized them to do so. On about the 14th of June, Capt. Colcord informed me of the wreck, & that she was to be sold at auction. I instructed Capt. Humphrys to purchase for the N. B. L. & T. Co., the entire lighterage outfit, including tents, house, coal, etc. I afterwards ascertained that all he had purchased for the N. B. L. & To. Co. was the anchors. He purchased 100 tons of coal at $4.00 per ton, & for the same coal he

(Testimony of H. E. Pennell.)

charged the "Dorothy" $60.00 per ton. I know it to be a fact, that Capt. Humphrey managed the N. B. L. & T. Co.'s plant to his own advantage, which was not to the interest of our Co. I also requested him to put up at once our knock-down lighter, which he did not do. At this time she being worth $400.00 per day, a loss of 10 days, or $4,000.00. On the 3rd of July I took over the business from Capt. Humphry, I requesting him to give me a complete statement & vouchers, also the earnings, which he agreed to do, but did not, although asked by me many times to do so. Was unable to get any kind of a statement until the night of the 22 of July, which Mr. J. B. Dyer succeeded in getting, the one I herewith submit. I do not accept the same as a settlement or as a correct statement. I hereby request that Mr. Humphreys turn the books over with all vouchers. I also suggest that Mr. Humphrys be charged rent for the use of lot from 5th of June until the time he vacates, at the rate of not less than $25.00 per day; also interest on the earnings of the lighterage company up to the time he turns the entire amount over (at Nome rates.)

On leaving Nome, I left the business in charge of J. B. Dyer, giving him my full power of attorney.

E. S. MORINE.

Q. Now, Mr. Pennell, did you subsequently receive a communication from Mr. Humphrey? A. I did.

Q. With regard to his accounts and his transactions in that matter? A. I did.

Q. Have you it with you?

A. Yes, sir (producing).

(Testimony of H. E. Pennell.)

Mr. FRANK.—I offer this letter in evidence.

Mr. VAN NESS.—In view of the Court's previous ruling, it seems to me unnecessary to make any specific objection to that letter. I rest on my previous objection.

The COURT.—I overrule the objection.

Mr. VAN NESS.—I will take an exception.

(The letter is marked Plaintiff's Exhibit No. 12.)

Mr. FRANK (reading):

Plaintiff's Exhibit No. 12.

PACIFIC STEAM WHALING CO.

Seattle, Wash., August 21, 1900.

Mr. H. E. Pennell, Secy. N. B. L. & T. Co., San Francisco, Cal.

Dear Sir: Yours under date of July 2nd recived by me on my arrival at this place The contents of your letter has been a source of great satisfaction to me to know that my services for the Nome Beach Lighterage & Transportation Company and the action I have taken up to the time I left Nome in regard to their affairs at that place, meets with your approval.

The action which I took at the time Capt. Moraine was taken sick and on the arrival of the "Catherine Sudden," I took for the benefit of the stockholders of the Nome Beach Lighterage & Transportation Company, and nearly all of them I considered personal friends, and I readily took in the situation, and in conversation with Capt. Colcord and others interested in your Company, they as well as myself could see that your business venture

(Testimony of H. E. Pennell.)

at Nome would be a first-class failure without some person giving a helping hand at that time, which I did as you well know, drawing a draft on you for $2,500.00 in payment for the money which, as you understand, I had no right to advance, belonging to the Pacific Steam Whaling Company, and while I carried out what I undertook, I will leave you to judge, using your property in the same manner, or as nearly as possible as I did the Pacific Steam Whaling Company's.

During the time of the rush to Nome, Capt. Moraine was sick, and on the arrival of the "Catherine Sudden" the crew clamoured about my office demanding that I pay them off for their services rendered on board of the vessel. Capt. Moraine has appointed me as his agent, and as you well know, Capt. Moraine did not have the power to do so, as he was appointed agent of the N. B. L. & T. Co. by the Directors, but a power which the Directors did not give him to appoint any other person. Again I used the Pacific Steam Whaling Company's money to satisfy the demands of the crew of the "Catherine Sudden."

Capt. Colcord informed me that Capt. Moraine had brought money with him from San Francisco, and he went to Capt. Moraine's tent and got his cash box and together we counted the money, which amounted to some six hundred dollars, more or less, I do not remember the exact amount, which was not sufficient, and I again used the Pacific Steam Whaling Company's money.

Everything went on peaceably, and the N. B. L. & T. Co. made money and Capt. Moraine, after he was able

(Testimony of H. E. Pennell.)

to be out, assumed, to a certain extent, charge of the business, which of course you understand did not suit an old sailor like myself to have any interference, and I turned the business all over to him, and he then demanded from me a settlement. At the time I did not understand that a settlement meant that I should turn over to him all the money belonging to the N. B. L. & T. Co., nor do I understand it so at present, but I gave him an accounting and advanced him some seven hundred dollars in cash, which I hold his receipt for, account N. B. L. & T. Co.

I was very busy at the time, and to do this it interfered with my work, as I only had one bookkeeper, and did an enormous amount of business in a very short time, so much so that at the time I left Nome my books were not straightened out, and when Capt. Moraine left he appoined Mr. Dyer as agent for the N. B. L. & T. Co., and Mr. Dyer demanded a settlement from me and payment of all money due that company, which I positively and emphatically refused to give, for the reason that I was informed that Captain Moraine had collected some $1,200.00 for services rendered in towing, etc., after I had turned the business over to him. In addition to the seven hundred dollars which I had advanced him only a short time before, I did not consider that the N. B. L. & T. Co. had any debts at Nome which required that amount of money.

Mr. Dyer informed me that there was no money on hand with which to carry on the business, and he wished me to issue drafts on the Pacific Steam Whaling Com-

(Testimony of H. E. Pennell.)

pany for the amount due the N. B. L. & T. Co., which I refused to do, and I did, after due consideration, issue two one thousand dollar drafts. Mr. Dyer demanded of me money, an served me with a lawyer's letter, which did not amount to anything any more than to hurt my feelings and perhaps cause me to think that I had not been given credit for what I had done, and at the same time no mention had been made for my services nor had anything been said about the interest on money which I had been paying for at the rate of five per cent per month to carry on the Pacific Steam Whaling Company's business, as well as the N. B. L. & T. Co., and as you well understand, I had no money, and while I was doing a large business, all of my settlements were made for services rendered in drafts, which were forwarded to our office, and to settle for labor, lighters, etc., it required cash, and I am very proud to say there was no paper in Nome accepted more readily than my draft on the Pacific Steam Whaling Company, and owing to that fact and my standing as a business man there, the bank advanced me money to settle my bills, charging me at the rate of five per cent.

From Mr. Griffith, Manager of the Pacific Steam Whaling Co., I understand a settlement has been demanded in San Francisco, which he has refused to give until my return, which I advised him so to do, as I wish to place before Mr. Griffith, Manager of the Pacific Steam Whaling Company, a statement of everything I did for the N. B. L. & T. Co., and it was for him to decide what recompense, if any, the Pacific Steam Whaling Company,

(Testimony of H. E. Pennell.)

should have for services rendered, as you understand I was an employee of that company.

I felt morally certain that before I got through with what I was doing there would be some trouble over it.

Please bear in mind that I do not question any of Capt. Maraine's actions at Nome or Mr. Dyer's, nor did I criticise them any more than I think they did me a gross injustice by presuming to demand by law a settlement for the business I had done for the N. B. L. & T. Co., for had Mr. Dyer looked into the matter he would readily have seen that he was not an agent of that company or that Capt. Moraine had the power to appoint him an agent, and it is not for Mr. Dyer to question whether he obtained a satisfactory statement, whether he obtained money or anything else from me.

I merely write this letter to you to justify any actions which I have taken in this matter regarding the settlement which I hope will be satisfactorily explained on my arrival in San Francisco. I will, however, state that if I had held control of the N. B. L. & T. Co.'s tugs, and lighters, and Capt. Moraine had gone to San Francisco, things would have proven a great deal more satisfactory to your comapny than what it now will.

I return to Nome by the "Roanoke" to-morrow, and hope to be in San Francisco by the middle or last of September.

Enclosed please find copy of letter of Mr. J. B. Dyer to me, presented by Mr. Reynolds, atorney for the N. B. L. & T. Co.

(Testimony of H. E. Pennell.)

Thanking you for your kind appreciation for the services rendered your company, I remain,

Yours very respectfully,

OMAR J. HUMPHREY.

The witness continuing testified: I finally obtained a settlement with Mr. Humphrey. He turned over to me the accounts and vouchers. I have the account here. With that account he presented me vouchers showing where the coal came from that he furnished to the "Dorothy" up there, and which Morine says he charged $60 a ton for.

The witness here produced two statements of account.

The witness continuing testified: There are two accounts. The launch "Dorothy" and the lighter "Shamrock." These are accounts of recepts and disbursements for account of the "Dorothy." No. 1 shows receipts for the launch "Dorothy," and No. 2 the disbursements. The said account was marked Plaintiff's Exhibit No. 13, the sheets numbered separately 1 and 2, and offered and read in evidence. The account is in the words and figures following:

Sheet 1.

Plaintiff's Exhibit No. 13.

Nome Beach Lighterage and Transportation Co., in account with Omar J. Humphrey, Agent N. B. L. & T. Co.

Launch "Dorothy."

June 13.	Priess & Fox, a/c "San Blas"	$150.00
" 22.	Priess & Fox, a/c "San Blas"	50.00
" 22.	Priess & Fox, a/c "Senator"	125.00

(Testimony of H. E. Pennell.)

"	22.	Priess & Fox, a/c "South Portland" ..	50.00
"	22.	Priess & Fox, a/c "San Pedro"	25.00
"	22.	Priess & Fox, a/c "Alliance"	50.00
"	22.	Priess & Fox, a/c "Valencia"	75.00
"	22.	E. J. R. L. Co. a/c "Geo. W. Elder" ..	125.00
"	22.	E. J. R. L. Co., a/c "Valencia"	50.00
"	22.	E. J. R. L. Co., a/c "Brunswick"	75.00
"	22.	A. G. H. Potts, a/c "San Blas"	25.00
"	22.	A. G. H. Potts, a/c "Geo. W. Elder" ..	475.00
"	22.	A. G. H. Potts, a/c "Senator"	25.00
"	22.	A. G. H. Potts, a/c "Alliance"	25.00
"	22.	A. G. H. Potts, a/c "South Portland" ..	400.00
"	22.	A. G. H. Potts, a/c "Nome City"	350.00
"	22.	A. G. H. Potts, a/c "Volante"	75.00
"	22.	C. D. Lane, a/c "Sequoia"	25.00
"	22.	C. D. Lane, a/c "Victoria"	25.00
"	22.	Nome Water Co., a/c "Grace Dollar"..	425.00
"	22.	Carrington & Co., a/c "Lakme"	50.00
"	22.	Carrington & Co., a/c "Alliance"	25.00
"	22.	S. Y. T. Co., a/c "Centennial"	100.00
"	22.	S. Y. T. Co. a/c "Falkenburg"	25.00
"	22.	Schr. "Fred E. Sanders"	125.00
July	5.	Alaska Com'l Co., a/c "San Jose"	120.00
"	5.	Alaska Com'l Co., a/c "Signal"	200.00
"	5.	Alaska Com'l Co., a/c "Ranier"	240.00
"	5.	Alaska Com'l Co., a/c "Kodiak"	40.00
"	5.	Alaska Com'l Co., a/c "St. Paul"	60.00
"	5.	Alaska Com'l Co., a/c "Dora"	20.00
"	5.	Alaska Com'l Co., a/c "Sunol"	40.00
"	5.	Alaska Com'l Co., a/c "York"	20.00

(Testimony of H. E. Pennell.)

"	5.	Schr. "Fred E. Sanders"	800.00
"	5.	E. J. R. L. Co., a/c "Victoria"	50.00
"	5.	A. G. H. Potts, a/c "Northern Light"..	100.00
"	5.	A. G. H. Potts a/c "Chas. Nelson"	75.00
"	5.	A. G. H. Pots a/c "W. G. Irwin"	50.00
"	5.	S. Y. T. Co. a/c "Centennial"	25.00
"	5.	S. Y. T. Co., a/c "Dispatch"	25.00
"	5.	Nome Water Co., a/c "Fred. F. Sanders"	140.00
"	5.	N. A. T. & T. Co., a/c "Red Lighter"...	50.00
"	5.	N. A. T. & T. Co., a/c "Newsboy"	80.00
"	5.	N. A. T. & T. Co., a/c "Jos. L. Eviston".	220.00
"	5.	Bark "Mercury"	375.00
"	5.	Schr. "Vine"	100.00
"	3.	Cash a/c "Wanderer"	40.00
"	5.	S. Y. T. Co. a/c "Winslow"	150.00
			$5,970.00

Sheet 2.

Launch "Dorothy."

Nome Beach Lighterage and Transportation Co., in account with Omar J. Humphrey, Agent N. B. L. & T. Co.

June 26.		R. D. Read, Master, (1) .....$	35.00
"	26.	Theo. Morris, Engineer, (2)	43.00
"	30.	S. S. "Hume," 75 Meals for crew, (3) $1.00	75.00
"	30.	S. S. "Hume," 800 gals. Water, (3) .02	16.00
"	30.	S. S. "Valencia," Labor on valve, (4)	20.00
"	30.	S. S. "Valencia," 5 gal. Torch Oil, (4)	2.50

(Testimony of H. E. Pennell.)

July 6.	S. S. "Thrasher" 6 sax Coal (5) 60.00...		18.00
" 7.	S. S. "Hume," 112 sax Coal 6 t. 1374 lb (6) 60.00		401.22
" 7.	S. S. "Hume," 150 gal. Water (6) .02 ..		3.00
" 13.	Labor (Carpenter) (7)		45.50
" 14.	Paid Tug "Oriole" (8)		25.00
" 16.	850 gal. Water (N. A. T. Co.) (9).*25		21.25
" 16.	Supplies furnished (10)		9.13
			$714.60
	Balance		$5,255.40
			$5,970.00

The witness continuing testified: This account is that of the lighter "Shamrock."

The account was marked Plaintiff's Exhibit No. 14, and offered and read in evidence, and is in the words and figures following to wit:

Plaintiff's Exhibit No. 14.

Nome Beach Lighterage and Transportation Co., in account with Omar J. Humphrey, Agent N. B. L. & T. Co.

Lighter "Shamrock."

June 16.	Labor $110.00	
" 18.	Labor	190.00
" 19.	Launch "Islam," a/c "San Blas"	200.00
" 22.	Launch "Islam," a/c "Senator"	100.00

" 30.	Labor.....	2.00
July 2.	Labor	17.00
		619.00
	Balance	6,221.06
		$6,840.00
June 22.	A. C. Co., 10 days, $400.00	$4,000.00
" 22.	"San Blas" 100 tons, 9.00	900.00
" 26.	"Senator," 40 tons, 8.00	320.00
" 30.	A. C. Co., 3¾ days, 400.00	1,500.00
July 3.	Cash, a/c "Wanderer"	120.00
		$6,840.00

Summary.

General Account $11,097.55		
"Dorothy"		$5,255.40
"Shamrock"		6,221.00
Balance	378.85	
	$11,476.40	$11,476.40
also	2,500	
	378.85	
	2,878.85	

(Counsel, handing witness Plaintiff's Exhibit No. 13.)

Q. Mr. Pennell, tell us what these two sheets are that I now hand you.

A. This is what has been designated as a general account, receipts and disbursements.

The witness continuing testified: That was a separate matter from the receipts and disbursements affecting the

(Testimony of H. E. Pennell.)

launch and the barge, kept separately. That is the debit and credit side of the general account. Like the other, it is a memorandum of receipts and disbursements. This contains the receipts, and this contains the disbursements.

Mr. FRANK.—We will mark No. 1 the receipts, and No. 2 the disbursements.

The WITNESS. If I am not mistaken, Mr. Frank, in passing out that other paper a recapitulation got stuck to it, a summary of the whole.

Q. This one?

A. Yes, sir; that is a summary of the entire accounts showing a final balance.

The paper referred to in the last answer of the witness was marked Plaintiff's Exhibit No. 15, and the sheets Nos. 1 and 2. Said paper was read in evidence, and was as follows:

Plaintiff's Exhibit No. 15.

Sheet No. 1.

Nome Beach Lighterage and Transportation Co., in account with Omar J. Humphrey, Agent N. B. L. & T. Co.

General Account.

June 30.	Cash, Ballast sold	$ 320.00
" 30.	Cash, Roby & Anderson, surf boat for 1 trip	75.00
" 30.	A. C. Co., Lighter "Erin" rent	1,000.00
July 20.	Bill for towing	285.00
	Balance	11,097.55
		$12,777.55

(Testimony of H. E. Pennell.)

Sheet 2.

Nome Beach Lighterage and Transportation Co., in account with Omar J. Humphrey, Agent N. B. L. & T. Co.

General Account.

June 18.	Labor, (1)	...$	91.00
" 23.	Anchors etc. from "Sudden," (2) ...		70.00
" 25.	Labor, 47.75; Panno c/s. Slops J8 764		
June 23,	(3) 14775		764.00
	61625		

E. S. Morine 100—June 8.

" 25.	Bill of A. E. Co., (4)	17.00
" 30.	Corwin Trading Co., ...	2,500.00
" 30.	Labor, (5)	233.00
" 30.	Labor, (6)	35.00
" 30.	Lumber, (7)	128.00
" 30.	Meals furnished, (8)	60.00
July 2.	Labor, (9)	163.00
" 5.	Labor, (10)	105.75
" 5.	Bill of Dr. Bond, (11)	75.00
" 5.	Paint Brushes, (12)	3.00
" 5.	Hauling, (13)	7.50
" 5.	Labor, (14)	2.00
" 5.	E. S. Morine, J8, (15)	100.00
" 9.	Pro. salary A. H. Harriman 6-10 to 7-10, $150.00	75.00
" 9.	Pro. salary Wm. Herbert 6-10 to 7-10, 100.00	50.00
" 9.	Pro. salary C. E. Thompson 6-10 to 7-10, 100.00..	50.00

(Testimony of H. E. Pennell.)

July	9.	Pro. salary N. D. Platt 6-10 to 7-10, 100.00	75.00
"	9.	Pro. Office Rent 6-10 to 7-10 150.00	75.00
"	9.	Pro. Board—30 days at $12.00, 360.00	180.00
"	9.	Stationery	10.00
"	9.	E. S. Morine J-8, 16	700.00
"	9.	2 pr. Blankets (S. E. Morine), (17) 3.00	6.00
"	14.	Labor, (18)	57.00
"	14.	Labor, (19)	8.00
"	16.	Bills turned over Schr. "Vine"	100.00
"	16.	Bills turned over Bk. "Mercury"	375.00
"	16.	Bills turned over Schr. "F. E. Sanders"	225.00
"	18.	Bills turned over Nome Water Co.	140.00
"	18.	Bills turned over S. Y. T. Co.	25.00
"	18.	Labor on New House, (20)	921.75
"	18.	Sheet iron, doors, etc. for New House (21)	157.54
"	18.	Lumber for New House, (22)	197.48
"	18.	Stove & Cooking Utensils, (23)	145.25
"	23.	Cash Advanced, J-8. (24)	2,000.00
"	24.	Water Cask, (25)	25.00
"	25.	O. J. Humphrey, services rendered, (26)	2,500.00
"	25.	A H. Harriman, 7-12 to 7-24 Inc. $150.00 (27)	65.00
"	25.	Wm. Herbert, 7-12 to 7-24 Inc. $100.00 (27)	43.34

Testimony of H. E. Pennell.)

July 25.	C. E. Thompson, 7-12 to 7-24 Inc. $100.00 (27)	43.34
" 25.	Labor, (28)	49.00
Aug. 4.	Board, (29)	60.00
" 8.	Board, (30)	32.60
Oct. 10.	Coal Sacks, 300 sax @ 15c, (31)	45.00
Nov. 5.	Board, Humphrey, (32)	12.00
		$12,777.55

Q. Mr. Pennell, I call your attention to Exhibit No. 13, "July 6th, S. S. Thrasher, 6 sacks coal, 5, $60. July 7th, Hume, 112 sacks, 6t. 1374 pounds, $660." What do the "5" and the "6" there mean?

A. In the item, "Thrasher, 6 sacks coal" stands for what it reads, 6 sacks. There are 6 tons, 1375 lbs. He bought 6 sacks of coal from the steamer "Thrasher," and bought 6 tons 1375 lbs. from the steamer "Hume." The "Hume" and the "Thrasher" belong to the Pacific Steam Whaling Company. That is the coal that is shown to be sold to the "Dorothy." "5" and "6" in red are the voucher numbers.

Q. In the account Exhibit 15, I find an item on sheet No. 2, at the top, "June 23d, anchors, etc. from the Sudden, $70." What are those anchors?

A. That was a Nome transaction, but so far as my accounts show to me they are what we call mushroom anchors that were shipped up there on the "Sudden." Mushroom anchors are a peculiar anchor, an anchor made for a mooring. It is not a ship's anchor; it is a mooring an-

(Testimony of H. E. Pennell.)

chor, built like a mushroom upside down. That is where it gets its name. They were not of any commercial value as anchors. They are adapted to soft bottoms, for moorings, and not for anchoring vessels, but for holding moorings; and they were sent up there with the original intention of placing them to hold lines from the beach for the purpose of sending out a line and holding it fast to take lighters to and from the beach with; and they were sent as an experimental proposition. They were of the value of so much iron.

Upon cross-examination the witness testified: "I have never been in Nome. I do not know what the value of iron was in Nome in June, 1900. I know what kind of anchors were being used at Nome in 1900. All I know about it is that Nome had no wharves, and that ships going there anchored in the open roadstead. I have sought information as to which anchors were better adapted to that use from people who had been lightering. I have asked what anchors were bought or sold up there. I never talked with anyone about the commercial or salable value of anchors in Nome. I was never told of a mushroom anchor being offered for sale or of anyone trying to buy one up there. The style of mushroom anchor to my knowledge is not such as would make it commercially valuable at Nome. It might be possible that some people at Nome have a different view as to the possible utility of mushroom anchors from mine. They might then have had commercial value. Whether there were any such persons up there I could not say. I only know by general knowl-

(Testimony of H. E. Pennell.)

edge whether mushroom anchors did or did not have a commercial value up there. I do not know what their value would have been as old iron. We paid four and one-half cents per pound for these mushroom anchors at San Francisco. We had them made to order. We paid approximately $190 for the seven anchors that were sold at that sale and that were bought in for the Nome Beach Lighterage and Transportation Company. There was nothing else to my knowledge bought in at that sale which subsequently came into the possession of the Nome Beach Lighterage and Transportation Company. I do not know who bought in the cargo at Nome of the Nome Beach Lighterage and Transportation Company. I know nothing more of that than what the sale report might show I was never reported to me by Capt. Morine or Omar J. Humphrey, or Capt. Panno, or any of these gentlemen up there that were connected with my company, as to who it was that bought in that cargo at that sale. I do not know that the "Corwin" people made that bid of $530 and bought that cargo. I have never been informed about that, and have never taken the trouble to inquire. I do not know that I ever have had any particular interest to know who came into possession of it. I am able to tell you in a general way what that cargo consisted of from the manifest, of which there is a copy here. A specific idea are my vouchers for the purchase of it.

Q. Turning to the manifest, which is in evidence, I find among other items, 150 tons of coal. Will you tell us whether that coal was shipped up there for the purpose

(Testimony of H. E. Pennell.)

of being sold in the market, or to be used upon the steam launch "Dorothy" in the lighterage business?

A. Both. I would say, that over 100 tons was shipped up there for commercial purposes. A large portion of the coal that was shipped up there was to be used commercially. I could not exactly say now what the burning capacity of the "Dorothy" would be; it would be small. It was mainly for commercial purposes, or to transport in the "Catherine Sudden" elsewhere, if a better market offered.

The witness continuing testified: The groceries were intended for the use of the "Sudden," if she might go in the passenger service, and for employees on the boat. I do not think any portion of the cargo, outside of the coal was shipped up there for commercial sale. It was all intended for the use of people either on the "Sudden" or the employees of the company at Nome Beach. I do not know how many anchors were shipped up. I said seven of the mushrooms. There were some small anchors. I do not know what became of the anchors other than the mushroom anchors. Of the 150 tons of coal there were 48 tons and 1860 lbs. in bulk, cost at San Francisco $5.50 per ton; 49 tons, 580 lbs., sacked, $5.75 per ton and four cents a sack for sacking 946 sacks; the total cost of that coal and sacking was $577.87, net cash; 25 tons, 960 lbs., at $7.25 per ton, cost of sacking and sacks, total, $224.23; 29 tons, 400 lbs. at $6.75 per ton, and sacking and sacks, $238.62; 1 ton of coal, $8, 20 sacks, total, $9.20, of the 150 tons of coal. The reporter has how many tons were

(Testimony of H. E. Pennell.)

in bulk and how many tons in sacks. The seven small anchors cost $59.15; another anchor, an 125 lb. anchor, $8.13; 60 fathoms of chain, $33.16; and in addition to that I had seven mushroom anchors, and more probably through these bills. The mushroom anchors were sent up there for beach work; and whether the ten anchors in the manifest include the mushroom anchors I cannot say now. My record shows here already eight small anchors. They belonged to this lighterage plant. These are boat anchors. The only anchors I know of outside of the eight were the ship's anchors. I may find out the ten and the seven would be a shipment by themselves. I believe there were one or two second-hand anchors, and that would probably make out the ten of the shipment. There may be some little items outside of those, but here is our main bill of invoice cost of provisions outside of coal, anchors and chains, amounting to $3,313. There were some small items outside of that; one for $36, and still some others. They run through quite a few vouchers. $100, I would say, would cover it, outside of that, in the way of provisions. Under the head of cargo there was shipped on that cargo quite a few other items. We had a large amount of tinware and cooking utensils, an outfit for cookhouse, and hardware. We had large bills for hardware, something over $100 for hardware. There was one bill for tinware and cooking utensils and things of that character, plates, and steam heater, and general cookhouse outfit, glasses, pitchers, etc., $240. There was also chandlery, a big lot of chandlery outfit, oakum, paint,

(Testimony of H. E. Pennell.)

miscellaneous iron works, blocks, tar, a general assortment of chandlery that was to be used in connection with the operation of the lighterage plant and for the vessel, as supplies for the vessel. This vessel was presumed probably to sail for there on other voyages. The principal purpose of the trip up to Nome was for landing that lighterage plant and equipping it at Nome for lighterage purposes. The name of the company implies what it was —transportation and lighterage. The transportation was the "Catherine Sudden" part of it. We expected to run her from Nome probably to St. Michaels and back, and then fit out with passengers, and then back to Puget Sound, and then, if we could, into Nome, and then back to San Francisco. We bought the "Sudden" that year the purpose of fitting her out. I do not remember what the tonnage of the ship was, exactly. I should estimate that the tonnage of the load was 800 tons all told. I should not think her registered tonnage was under 400, and from that upwards to 500. However, her record is in the Custom House now. I can tell you who the stockholders of the Nome Beach Lighterage and Transportation Company were in June, 1900: Joseph B. Dyer, E. O. Tuttle, E. T. Kruse, H. B. Madison, W. E. Balcom, H. E. Pennell, T. P. Colcord, W. S. Goodfellow, S. E. Slade, Robert Sudden, Peter Dean, Clara A. Landsberg, L. E. Spear, W. F. Dixie, Thomas Jennings, Olive R. Chapman, C. Dickie, W. D. Strands, F. C. Howard, J. L. Panno, C. M. Curtis, K. E. Morine, H. S. Huff, L. J. Neil and Gertrude McLaughlin. Mr. Kruse owned one share; I owned one.

(Testimony of H. E. Pennell.)

We built the lighterage outfit. The square lighters, one knocked down and one ready to launch, cost $510.46 altogether. The launch "Dorothy" cost, when she left here, $4,476.44. The two surf boats cost $921. I have the beach outfit separate. Everything is included in this account in the aggregate. The underdeck cargo, including the coal, amounts to $9168. I have given you the lighters separate, the launch separate, and the surf boats separate. The beach outfit did not include them. It includes the small anchors, the mushroom anchors. That is the underdeck cargo of the "Sudden." Our purpose was to establish upon Nome Beach a lighterage outfit, for the purpose of lightering vessels on Nome Beach. We did business there throughout the season of 1900, and continued business there in 1901, lightering vessels. That winter we shifted to Teller, above Nome. What we had left of our lighterage outfit we shifted up there, that is above Nome, and is another mining settlement some sixty or seventy-five miles up the coast. It is a permanent place. We did business there in 1902. We went up to Teller before the winter set in. Teller is not an open roadstead; it it is inclosed inland. There is a bay and a harbor. They have wharves at Teller. We did business there in 1901. We are still doing business there. We transacted business there during this current year 1902. We lost our lighters and lost our surf boats during 1900. I cannot tell the exact day. We had several smashups and were repaired; taken ashore and repaired; but finally were smashed up altogether. They went ashore in bad weather.

(Testimony of H. E. Pennell.)

The WITNESS.—If your Honor please, before proceeding further I wish to correct my statement in one point made yesterday. Yesterday, when asked in regard to an answer to a letter from Captain Humphrey, I stated upon my best recollection that I did not have a copy of that letter. In thinking the matter over I had come to the conclusion that not having that copy, it had been a matter of a personal letter, and that was my reason for not having kept a copy of it. Last night, in looking up for Mr. Van Ness the registry of the "Catherine Sudden," and rummaging through papers in my office, I found in a copy-book of the Simpson Lumber Company, a copy-book belonging to another company, this copy of a letter to Captain Humphrey, and I have it with me, and I wish to correct the statement that I made in that regard.

Mr. VAN NESS.—Of course, it does not lie with me, if your Honor please, to call for the letter, because I have objected to the contents of that letter going into evidence either orally or otherwise. I suppose, however, it is due to Mr. Pennell to produce the letter, and, under your Honor's ruling, and subject to our exception, to read it. I simply say that because I think it it due to Mr. Pennell.

Mr. FRANK.—All that we want to do is to bring it here to correct the statement. He did not have the copy of it. We have the copy of it, and it is now here.

Mr. VAN NESS.—I ask now that there be stricken from the the record all Mr. Pennell's testimony as to the contents of that letter, what it did or did not contain. That leaves the case in the same situation that it would

(Testimony of H. E. Pennell.)

be in if there were no letter at all. Of course, what Mr. Pennell said in regard to the contents of the letter is immaterial, irrelevant and incompetent.

The COURT.—I suppose the matter stands as if he was questioned now for the first time in reference to the contents of the letter?

Mr. VAN NESS.—Yes, sir. I suppose your Honor will grant my motion to strike out what he previously said as to the contents of the letter?

The COURT.—Yes; the motion is granted. I have been very much interested in this argument, and I confess that I am not clear about it; but my best judgment is that the word "risk" in this policy must be construed to mean the risk assumed in the policy, and that the value of the property insured must be held to be that value stated in the policy. And that being my opinion, the objection to the testimony offered will have to be sustained.

Mr. VAN NESS.—We note an exception.

The witness continuing testified: I did not receive any report from Captain Morine subsequent to the turning over of the lighterage plant to him, in which he made any accounting of the earnings of that plant. He never made any accounting of the earnings of the lighterage plant during the time that he was in charge after Mr. Humphrey retired; that is, after he took the property back from Mr. Humphrey. Mr. Dyer attended to our business up there, after Captain Morine retired. At the end of the season of 1900 we received a report showing the earnings

(Testimony of H. E. Pennell.)

of the lighterage plant between the time that Captain Humphrey turned it over to Captain Morine and the time that Mr. Dyer repoted. I have that report here. It is a monthly report. I can give the balance, the net result of the venture. The net result is $3,734.85 up to late. The net earnings of the lighterage plant at Nome for the season of 1900 were $1,270.70; that is the net earning of the "Dorothy." That includes what was earned in Captain Morine's administration, all of our property combined.

Q. Were you operating your property in any way up there, except in the lighterage business, at that time?

A. No, sir; no returns except from that business.

Q. What period of time did that cover in operation, Mr. Pennell, that $1,270.70?

A. From about the middle of July up to the latter part of October.

Q. I find in these accounts already in evidence one in relation to the lighter "Shamrock." Is that one of the lighters sent up on the "Sudden?" A. Yes, sir.

Q. Handing you Plaintiff's Exhibit No. 13, I find on that statement the word and figures "Balance $5,255.40." Will you tell me what that $5,255.40 represents on that account?

A. $5,255.40 is the balance due to the steamer "Dorothy," as between the earnings and the disbursements of that boat; that is the net profit on the operation of the boat during this time, on the "Dorothy."

Q. Now, I hand you Plaintiff's Exhibit No. 14, headed, "Nome Beach Lighterage and Transportation Company in account with Omar J. Humphrey, agent N. B. L. & T.

(Testimony of H. E. Pennell.)

Co., Lighter Shamrock." I find "Balance $6,221." Tell me what that balance was.

A. $6,221 is the net earning under this account of the lighter "Shamrock" from June 16th to July 3d.

Q. Now, I hand you Plaintiff's Exhibit No. 15, headed, "Nome Beach Lighterage and Transportation Company in account with Omar J. Humphrey, agent N. B. L. & T. Co." I find in there the phrase, "Balance $11,097.55." What does that word and those figures represent?

A. That is $11,097.55 which the Nome Beach Lighterage and Transportation Company is in debt to those other accounts for expenditures made in operating.

The witness continuing testified: The net profit of the operation of the launch and lighter was, during the period of time covered by Captain Humphrey's administration of the affairs of the Nome Beach Lighterage and Transportation Company, practically $378.85.

Q. Then, during the first part of the season, under Captain Humphrey's administration, during the season from June until July, you made $300 net on the operation of the plant, and under the administration of Captain Morine and Mr. Dyer, during the balance of the season, you made $1,270.70; is that it?

A. Yes, sir. That is not the fact that I am stating to you.

Q. Well, what is the fact?

A. I am answering in connection with those accounts.

Q. But what is the fact?

(Testimony of H. E. Pennell.)

A. It is a matter that would have to be figured out a little bit.

The witness continuing testified: There is a difference of $2,000. There is a matter here charged to us of $2500, which was afterwards compromised for $500, making this account show in our favor $2,000 better than what you have handed me; in fact, instead of a profit during these few weeks of $378, it was, in round numbers, $2,378. The net profit on the operation of the lighterage plant between the 10th of June, or thereabouts, and the 2d of July, was about $2,300. That computation of the net profit included the payment of $2,500, paid for salvage. The net earnings of the plant, outside of salvage, without regard to salvage, was about $2,500, and out of that we paid the $2,500 salvage.

The witness is here handed a paper by counsel for defendant, and the witness acknowledged signing the same, and testified that he believed that he had written it, and tendered it to Messrs. Spreckels & Brothers Co. upon handling them formal written proofs of loss. The letter was in the words and figures following:

Nathan H. Frank,
Attorney at Law, Telephone Main 454.
206 Sansome St.,
Rooms 23 and 24.

San Francisco, December 11, 1900.

Messrs. J. D. Spreckels & Brothers Co., Agents Standard Marine Ins. Co., Ltd., of Liverpool, England, 327 Market Street, S. F.

(Testimony of H. E. Pennell.)

Gentlemen: We have heretofore placed before you all of the information which we could get concerning the loss of the barkentine "Catherine Sudden" and her cargo, and to that end have produced before your representatives at meetings duly called for that purpose at the office of the San Francisco Board of Marine Underwriters all of the witnesses within our reach to the facts concerning said loss, and allowed you, through your attorney, to subject the sale to such cross-examination as to him seemed best, at the same time exhibiing to you such documents as we thought would aid you in the investigation.

That there may be no question between us regarding the technical matters entitling us to payment of the aforesaid loss, we now take occasion to formally present to you herewith proofs of loss and interest.

Hoping that we may receive prompt payment of the amount for which we are insured under your policy No. 26,969, issued on the 2nd day of May, 1900, we remain,

Very truly yours, etc.,

NOME BEACH LIGHTERAGE AND TRANSPORTATION CO.

Per H. E. PENNELL,

Sec'y.

The witness is here handed a paper by counsel for defendant, which witness identified as copies of the original proof of loss and interest referred to in the letter, Defendant's Exhibit No. 1.

(Testimony of H. E. Pennell.)

The witness continuing testified: I served the originals of these papers upon the company. At the time I served this proof of loss and interest I did not make any statement to Mr. Davis, or anybody else connected with the company, other than what is contained in my letter as to these proofs. At the time I handed in these proofs I understood they were documentary evidence of my claim upon which the company was expected to act in the matter of this loss.

Defendant then offered in evidence the proofs of loss referred to in letter Defendant's Exhibit No. 1, which were marked Defendant's Exhibit No. 2, and read in evidence. The said proof of loss contained among other papers the following:

CERTIFICATE OF AGENT OF INSURER.

I hereby certify that I was the agent of the Board of Marine Underwriters of San Francisco at Nome, Alaska, in June, 1900; that I arrived at Nome, Alaska, after the survey had been held upon the Barkentine "Catherine Sudden" and her cargo, and before the sale. That I stopped the sale, saw the survey, and investigated the loss, and became satisfied that the steps taken were the best that could be done for the interests of all parties concerned, under the circumstances, and therefore consented thereto.

Dated, San Francisco, December 5th, 1900.

(Signed) WALTER W. GOLLIN.

(Testimony of H. E. Pennell.)

Subscribed and sworn to before me this 5th day of December, A. D. 1900.

[Seal] (Signed) JAMES L. KING,
Notary Public in and for the City and County of San Francisco, State of California.

Nome, Alaska T., June 18th, 1900.

E. L. Woods, Esq., Secty. Board of Marine Underwriters, San Francisco.

Dear Sir: I landed here June 14th, 1900, safe and sound. Passing down the main thoroughfare I saw a crowd and an auctioneer hard at work. Asking one of the crowd what was going on, I found they were selling the cargo and hull of the "Catherine Sudden." I went up to the auctioneer and handed him my card & stopped the sale until I was satisfied that everything was in order, in fact, I was welcomed by Mr. F. W. Heustis, the President of the "Corwin" Co. and Captn. Humphrey of the Steam Whaling Co. I found the protest had been extended and a survey held, and under the circumstances the only thing to be done was to allow the sale to go on, as in case of a storm she was likely to go ashore and then nothing would have been saved, and of course this was entirely against the interests of the "Corwin" people. Every effort was made to find the owners of cargo, so that they could bid on their shipments. The conditions of the sale were that the goods were sold as appeared on the manifest, in fact many purchasers will find that a quantity of the cargo has disappeared and they have no recourse. The hull has been offered to me at less than it brought. Moreover the purchasers of

(Testimony of H. E. Pennell.)

cargo had to lighter the cargo and arrangements were made to charge $2.50 per ton for placing the cargo on the deck of the vessel. It was impossible to obtain a lighter. Of course, had it been possible to have got the merchandise on shore, the results would have been more profitable, but considering the disadvantages (which have to be seen to be appreciated) I am satisfied that the steps taken were the best. The proceeds of the sale are held by Mr. Heustis, Prs. of Corwin Co.

I enclose you an account of the loss of the Bark Alaska. This is the wildest place I ever struck, and I am afraid that the underwriters will suffer considerably. This place is not so bad when you get here and by avoiding lighterage on unfavorable days, I consider it fairly safe, but the main risk, I consider, is tackling the voyage too early in the season, and getting entangled in ice floes, this is particularly dangerous for sailing craft.

The Bark "Hunter" and Schr. "Eclipse" are reported lost, both crews being saved. The steamer "Centennial" was on the spit at Dutch Harbor & has been condemned. I was told of this just now. Captn. Humphreys tells me that the Stmr. "Rosecrans" is ashore on the mud flats off Yukon mouth and is in a very dangerous position. The Stmr. "Lakme" has arrived with the "J. A. Falkinberg" in tow. I think she has had a hard time of it. It is very hard to get news here, the wildest rumors gaining credence, but one thing is certain that smallpox is prevalent on several of the steamers, and I know of one case here. The "Olympia" arrived and re-

(Testimony of H. E. Pennell.)

ports three deaths from pneumonia and five in a bad condition.

Herewith find statement and returns of auction sale of "Catherine Sudden." I suppose Captn. Humphreys will send the protest.

There being no place for incoming vessels to report to, it is hard to get a record of arrivals and departures, perhaps when I get more familiar with this place, I will be able to give you more information.

With regards.

Very truly yours,
(Signed) WALTER W. GOLLIN.

State of California, }
City and County of San Francisco. } ss.

H. E. Pennell being duly sworn, deposes and says: That at all the times hereinafter mentioned he was, and still is, the Secretary of the Nome Beach Lighterage and Transportation Company. That as such Secretary he knows of his own personal knowledge of what the cargo belonging to the Nome Beach Lighterage & Transportation Company on board the Barkentine "Catherine Sudden" upon her last voyage from the Port of San Francisco to Nome, Alaska, consisted. That the cargo below deck consisted of the following items: 8 shots chain 1 & 1-4 inch; 7 pieces timber for buoys; 2 dories; 100 tons coal; furniture for portable house; one portable house; 7 mushroom anchors; assorted lumber; 1 pair gold scales; assorted hardware; assorted chandlery; 2 anchors 2260 lbs.; assorted lumber; 25 tons coal

(Testimony of H. E. Pennell.)

& 495 coal sacks; 29 tons coal and 500 coal sacks; oil stove and outfit; range and cookhouse outfit; 2 tents; 11 cases of oil; assorted lot of stationery; asorted lot groceries and provisions.

That the cargo on deck consisted of the following items: 2 square lighters; 2 surf boats; steam launch "Dorothy," and that the foregoing cargo was at the time of the issuance of the policy No. 26,969 of the Standard Marine Insurance Company dated May 2d, 1900, and at the time of the loss thereof, the property of the said Nome Beach Lighterage and Transportation Company.

Affiant further deposes that neither said Nome Beach Lighterage and Transportation Company, nor any of the officers thereof, so far as affiant is advised, has ever received or seen a copy of the report of the surveyors and condemnation of said ship and cargo at Nome, neither does affiant know where the same now is, notwithstanding affiant has made diligent inquiry regarding the same, and tried to secure possession of a copy thereof.

(Signed) H. E. PENNELL.

Subscribed and sworn to before me this 5th day of December, 1900.

[Seal] (Signed) JAMES L. KING,
Notary Public in and for the City and County of San Francisco, State of California.

State of California,
City and County of San Francisco. } ss.

O. J. Humphrey, being first duly sworn, deposes and says: That he was the agent of the Pacific Steam Whal-

(Testimony of H. E. Pennell.)

ing Company at Nome, Alaska, and by appointment of Captain Morine acted also as the agent of the Nome Beach Lighterage and Transportation Company at the time of the arrival at Nome of the barkentine "Catherine Sudden." That said vessel and cargo had, as affiant was informed by the master thereof, been abandoned at sea as a wreck, and was brought into Nome as a derelict by the steamer "Corwin." That a survey was held upon said vessel and cargo at my suggestion, which survey condemned the said vessel and cargo and recommended the same to be sold, and that both said vessel and cargo were thereafter sold at public auction in accordance with said recommendation of said surveyor. That the conditions then existing at Nome were such that the said cargo could not have been taken out of said vessel and discharged upon the shore except at ruinous cost, and expense of discharging and handling the same being much in excess of the value of said cargo in its damaged condition when discharged. That there was no market at said place, and the supplies being congested, and the cargo was stranded as you might say on a desert shore, an immense amount of freight was waiting to be handled, and there was not a place upon the beach to store it. That the claim for salvage on said ship and cargo was much in excess of fifty per cent. of its value, and the salvors refused to surrender possession of either ship or cargo. ~~without payment of their claims.~~

(Signed) OMAR J. HUMPHREY.

(Testimony of H. E. Pennell.)

Subscribed and sworn to before me, this 7th day of December, 1900.

[Seal] (Signed) JAMES L. KING,

Notary Public in and for the City and County of San Francisco, State of California.

State of California,
City and County of San Francisco. } ss.

A. H. Herriman, being first duly sworn, deposes and says: That he is a master mariner, and has been such for twenty-four years.

That in the month of June, 1900, and before the arrival of the barkentine "Catherine Sudden" at said place, affiant was at Nome, Alaska. That the said "Catherine Sudden" came into the roadstead at said Nome in tow of the steamer "Corwin" as salvors. That on the 11th day of June, 1900, affiant, together with Captain W. H. Ferguson and James M. Taverned, the ship's carpenter on the United States revenue cutter "Bear," was appointed as a board of survey to pass upon the condition of said vessel. That thereupon the three members of said board above named proceeded on board the said "Catherine Sudden," and made a careful survey of said vessel and her cargo, and made a written report thereof, which was thereafter delivered to the office of the Pacific Steam Whaling Company. That affiant has no copy of said survey, but from memory relates the following particulars:

We found the bow sprit and jibboom gone about six feet from the stem; we found the stem of the vessel gone into the wood ends, which extended somewhere about nine

(Testimony of H. E. Pennell.)

feet down—as far as we could see under the water; we found the foremast gone about six feet from the upper deck, together with all sails and rigging thereto attached; we found the mainmast gone about three feet from the upper deck, together with all sails and rigging thereto attached; we found the mizzen-mast gone about ten or eleven feet from the upper deck, together with all rigging and sails thereto attached.

On opening the hatches below we found the lower hold had been completely filled, and the cargo had been completely submerged in water to the upper deck beam, and we found the mark of the water where it had been up four feet on the forward part of the after house; an upper deck had been built from the aft house forward about seven feet high upon the main deck of the vessel. This indicated that the vessel had been submerged at least four feet above the main deck proper aft. There were several holes cut in her main deck; the partitions in the between decks were completely gone—had been washed out. The butts on the port side were badly started above water and strained. The cargo, a large portion of which consisted of perishable goods, had all been damaged by salt water. All the sky lights and hatches on the upper deck were washed away.

After making the survey we proceeded to the United States revenue cutter "Bear" to make out our report, and owing to the cargo being completely submerged in salt water, and a great portion of it being perishable, and the condition of the ship such that there were no chances of

(Testimony of H. E. Pennell.)

repairing nearer than Seattle, and the cost of towing and repairing being greater than the value of the ship when repaired, we recommended that the ship and cargo be sold for the benefit of all concerned, and she was sold upon that recommendation.

Affiant has not now a copy of said survey, and does not know where the same can be found. Affiant verily believes that the said proceedings and sale were, under the conditions then prevailing at Nome, the very best that could be done to conserve the interests of all parties concerned.

(Signed) A. H. HERRIMAN.

Subscribed and sworn to before me, this 7th day of December, 1900.

[Seal] (Signed) JAMES L. KING,

Notary Public, in and for the City and County of San Francisco, State of California.

Nome, Alaska, July 19, 1900.

To the President & Directors of the Nome Beach Lighterage & Transportation Co.

Gentlemen: I beg to inform you of the disaster of the "Catherine Sudden," on June 3d, 1900.

From the date of sailing, (April 28), up to May 28th, a voyage could not have been more successful, on the night of the 28th, we fell in with drift ice. My idea was to keep well to the West, which I did, but continued to meet large fields of ice and more of them the farther we went, although at times it looked as if we had passed the heaviest of it. On May 29th, we met with very large fields

(Testimony of H. E. Pennell.)

time and time again, almost closing us out. On June 1st, we were compelled to tie up, no opening appearing anywhre, ice solid for miles all around. While tied up we lay in company with the steamers "Portland," "Dora" and "Senator," sailing vessels "Pitcairn," "Rube Richardson," "Three Sisters" and "Winthrope." On June 2nd, all ships were compelled to change positions several times, owing to the shifting of the ice; on the morning of June 3rd, an opening appeared, which the steamers "Portland" and "Senator" took advantage of, the schooner "Three Sisters" followed up very close and at 8 o'clock everything looking favorable, I decided to follow; set topsail, gavsail, main-sail and jibs. A two and a half to a three mile breeze was blowing; the first mile everything went well, looked as if we would be able to get through without any trouble, but suddenly the ice shifted, almost closing the channel, leaving but a small opening on our port. Put helm hard starboard, but ship did not luff quick enough to clear, striking the flow on our port bow, staving in port port. Put all pumps at work and then made a thorough examination of ship; found that port planks were stove in; endeavored to stop leak by placing a loose bale of oakum on the out side; found I could not, so ran her on a large ice flow in hopes to be better able to repair port; had pumps going full capacity all the time, water gained on them very fast, ship setting forward and put port so deep in under water that we were unable to do a thing in the way of stopping leak. Set distress signals, "Pitcairn" and "Rube Richardson" came to our assistance.

(Testimony of H. E. Pennell.)

Knowing I could not save vessel and supposing she would sink within a very short time, my next endeavor was to save all I possibly could of the cargo; while part of the crew were saving stores, I had the rest of them clearing rigging in order to save deck load; (launch "Doratha," lighters, & etc.); up to this time water had gained very rapidly and in a very short time poop deck aft was under water. I then got into ship's boat and waited for wreck to sink or turn over. At midnight she listed to starboard, carrying away foremast and missbmast. At the same time scow and surf boat floated off of wreck, upper deck being under water. The steamer "Corwin" sighted us and came to our assistance. Mr. Bens and myself went on board and arranged with the Captain to haul "Dortha" off, he to receive what loose rigging there was. All this time "Pitcairn" and "Richardson" stood by and assisted in every way they could.

"Corwin" seeing that wreck was not sinking rapidly, made attempt to pump her out, which they succeeded in doing after four days. With the help of steam pumps and fifty men, they shifted cargo aft and put in new planks. The "Corwin" then decided to tow wreck into Nome. I then made arrangements with the "Corwin" people to tow "Dortha," scow and serff boats into Nome for the sum of $2,500.00. We started the night of the ninth, arriving at Nome, the night of the tenth. The "Corwin" claiming ship and cargo, which she took possession of and sold same at auction on June 15, the same day I left "Catherine Sudden" and came ashore.

(Testimony of H. E. Pennell.)

The "Pitcairn" and "Richardson" kept all they had saved, besides what had been put aboard them by us. I turned everything over to Captain Humphrey, as Capain Morine was very sick and had turned everything over to Mr. Humphrey.

Believe me, I am very sorry that I am not able to send in a successful report, instead of one of this nature. I hope and kindly ask that you will investigate this matter thoroughly.

Your Obedient Servant,

(Signed) J. L. PANNO.

REPORT OF SALE OF WRECK OF BARKENTINE "CATHERINE SUDDEN."

To Whom it May Concern:

After notice duly given by publication in the newspaper "The Gold Digger," a newspaper of general circulation, printed and published in Nome, District of Alaska, and by posting notices in six (6) conspicuous places in said City of Nome, and pursuant to the consent and agreement of Capt. O. J. Humphrey, Owners' Agent, Captain J. L. Panno, Master, and Walter W. Gollin, Agent of the Board of Marine Underwriters of San Francisco, the sale of the wrecked bakentine "Catherine Sudden" and her cargo was had in front of the office of the Pacific Steam Whaling Company, on Front Street, in the City of Nome, District of Alaska, on Thursday, the 14th day of June 1900, at 10:00 A. M. of said day at public auction, the said Humphrey and Gollin being personally present at said sale.

(Testimony of H. E. Pennell.)

The said cargo was sold as per the manifest, each consignment being sold separately, and the ship's stores and the goods belonging to the ship's owners in one lot and the hull, including all the furniture, rigging and appliances belonging to the ship, was sold in one lot.

Mr. Geo. O. Fogg, Treasurer of the Corwin Trading Co., Salvors of said barkentine, and Mr. N. D. Platt, representing Capt. O. J. Humphrey, Agent of the Owners, acted as clerks of said sale and make the following report of same. Report attached hereto.

NOTICE.

To Whom it May Concern:

Notice is hereby given that the wrecked Barkentine "Catherine Sudden," together with her apparel and furniture, will be sold at public auction, opposite the Pacific Steam Whaling Co.'s Office, on Thursday, June 14, 1900, at 10 o'clock A. M., to the highest bidder for cash.

Also that the general cargo of merchandise now contained in the hold of said Barkentine, will be sold at auction at the same time and place and upon the same terms, as the same appears upon the manifest of said Barkentine; said cargo being damaged by water.

Further particulars may be had by applying to F. W. Huestis, President of the Corwin Trading Company, or to G. I. Foster, Master of the Steamer "Corwin" on board of said vessel.

CORWIN TRADING CO.
By F. W. HUESTIS, Pres.

(Testimony of H. E. Pennell.)

G. I. Foster, Master S. S. "Corwin."

Lot No.	Consignee.	Amount sold for.
1	E. O. Tuttle	$ 100.00
2	Hank Summers	75.00
3	Henry Schwartzhultz	10.00
4	Pioneer Western Lumber Co.	80.00
5	Thos. L. Pelletier	610.00
6	Blanch Mining Co.	95.00
7	J. D. Wetherby	75.00
8	Deneen & Colcord	80.00
9	N. Bontain	115.00
10	Dryden & Dyer	400.00
11	J. Tyrell	55.00
12	Mrs. L. Quint	16.00
13	R. Tedford	4.50
14	The Alaska Venture Co.	1600.00
15	E. G. Gould	75.00
16	E. M. Dyer	110.00
17	Robie & Anderson	500.00
18	Noquers, Baker & Yoder	300.00
19	Allen & Fox	200.00
20	G. W. Close	405.00
21	Dickey & Howard	325.00
22	Wm. Fox	305.00
23	A. H. Barber	100.00
24	C. H. Gray	455.00
25	Alaska Exploration Co.	400.00
26	L. W. Selwin	30.00
27	Anchors, Buoys & Cables for lighterage	140.00

(Testimony of H. E. Pennell.)

28	Hull, &c.	1350.00
29	Ship's Stores, &c.	530.00
	Total	$8540.50

GEO. O. FOGG.
N. D. PLATT.

District of Alaska,
United States of America. } ss.

Geo. O. Fogg, being first duly sworn, on oath says that he has read the foregoing report and statement and knows the contents thereof. That the facts therein mentioned are true, and that the statement of the proceeds of said sale is a full, true and correct statement of the same.

[Seal] EDWIN B. McGOWAN,
Notary Public in and for the District of Alaska.

[10c Stamp. 10c Stamp.]

District of Alaska,
United States of America. } ss.

N. D. Platt, being first duly sworn, on oath says that he has read the foregoing report and statement and knows the contents thereof. That the facts therein mentioned are true and that said statement is a full, true and correct statement of the proceeds of said sale.

[Seal] EDWIN B. McGOWAN,
Notary Public in and for the District of Alaska.

Approved.
O. J. HUMPHREY,
Agt. N. B. L. & T. Co.

Approved. WALTER W. GOLLIN,
Agent Board of Marine Underwriters of San Francisco.

(Testimony of H. E. Pennell.)

District of Alaska,—ss.

John L. Panno, being first duly sworn, on his oath doth declare and make this, his protest as master of the Barkentine "Catherine Sudden" of the port of San Francisco, as follows:

The said ship or barkentine sailed from San Francisco, Cal., bound for Nome, Alaska, on the 28th day of April, A. D. 1900, in command of this affiant and proceeded on her voyage safely and well until on or about the 28th day of May, A. D. 1900, when in Latitude sixty-two degrees and twenty minutes N., and Longitude one hundred and sixty-two degrees and thirty minutes W., a floe of ice was encountered. We remained with ice about us for five days in about the same position, when on Sunday, June 3d, 1900, being in danger from the ice and the ice having to some extent opened, I endeavored to get clear of it. I was able to sail only about three miles when, although there was an opening ahead of us, it closed so rapidly that before I could change her course and without any possibility of avoiding it, we were struck by the ice and the port bow stove in. Whereupon the vessel began to fill rapidly and was sinking. I therefore caused her to be run "bow on" to a field of ice to keep her from sinking entirely, believing at the time that she would go to the bottom. That while in this condition, it appearing inevitable that the vessel would sink, I caused the fore and aft rigging to be cut away in order to save the steam launch and lighters which were on her deck. The vessel then settled in the water to her upper deck, filled and

(Testimony of H. E. Pennell.)

listed to port on her beam end. The main and mizzen mast went by the board and fore top-mast in eyes of rigging. One scow-lighter and one surf boat slipped from the deck into the water. The steam launch and one surf boat were still retained on the port deck of the vessel. During a portion of the time while we were surrounded by the ice, the steam ships "Portland" and "Senator" laid near us. This was before we were stoved by the ice. They had just passed out of sight when we were stoved as aforesaid. At the time of being stoved by the ice I set the the colors "Union down" and thereupon the brig "Pitcairn" and afterward the schooner "Rube L. Richardson" drew near, the crew of the former taking all the ship's stores from between decks, which they could carry, and the crew from the latter also taking a portion. These vessels remained near us until Monday, June 4th, 1900, the day following the accident; at about ten o'clock A. M., the steamer "Corwin" formerly known as the "Thomas Corwin," then a United States revenue cutter, got to us by breaking through the ice. I thereupon had the commander of the "Corwin" pull the steam launch from the deck of our vessel into the water; I having previously placed the steam launch in position for that purpose. The commander of the Corwin thereafter put his steam pumps on board our vessel and pumping out the water raised her so that we could repair the bow. He remained with us until Sunday, June 10th, 1900, when he towed the "Catherine Sudden" to anchorage off Nome Beach, her port of destination, arriving there about 9:30 P. M. on that day.

J. L. PANNO.

(Testimony of H. E. Pennell.)

Subscribed and sworn to before me, at Nome in the said District on the 11th day of June, A. D., 1900.

[Seal] EDWIN B. McGOWAN,

Notary Public in and for the District of Alaska.

United States of America,
State of California,
City and County of San Francisco. } ss.

On the twentieth day of November, A. D. one thousand nine hundred, before me, JAMES M. ELLIS, a notary public duly commissioned and sworn in and for the city and county of San Francisco aforesaid, residing therein, at my office, No. 323 Montgomery street in the city and county of San Francisco, personally appeared John L. Panno, master of the barkentine "Catherine Sudden" belonging to the port of San Francisco, who sailed from the port of San Francisco with said vessel on the —— day of April, 1900, with a cargo of coal and merchandise (a mixed cargo) bound for Nome Beach, Alaska, and by reason of accident by contact and collision with ice was disabled; and said barkentine was towed to anchorage by the "Thomas Corwin" off Nome Beach, and reached said beach in tow on the 10th day of June, 1900; and having experienced heavy weather on the passage by reason of contact and collision with a heavy floe of ice, and fearing damage, notes his protest to be extended if need be.

J. L. PANNO.

(Testimony of H. E. Pennell.)

Given under my hand and seal the day and year first above written.

[Seal] JAMES M. ELLIS,

Notary Public in and for the City and County of San Francisco, State of California.

[U. S. Int. Rev. Stamp 25c on original.]

Nome, Alaska, June 11th, 1900.

Mr. H. E. Pennell, Sec'y. Nome Beach L. & T. Co., San Francisco, Cal.

Dear Sir: I have this day, as agent of E. S. Morine of the Nome Beach L. & T. Co., duly appointed by him by power of attorney which is duly signed, sealed and delivered, drawn on you as Sec'y. of the Nome Beach L. & T. Co., for the sum of twenty-five hundred dollars, in favor of the Pacific Steam Whaling Co. In explanation of this will say that Capt. Morine was taken sick on his arrival here and has had an operation performed on the glands of the throat from which three cancers have been taken. Previous to his being operated upon he appointed me as his agent and so far as I am able, I will faithfully carry out this trust, said appointment being made upon the advice of Capt. Colcord, Mr. Dickey and Mr. Howard, who are stockholders in your company. While Capt. Morine is doing very well at the present time, the operation being considered successful, he is still in a very precarious condition.

The "Catherine Sudden" on June 3d had her bow ports stove by striking the ice and commenced to sink and was abandoned; the steamer "Corwin" picked her up and brought her to this port, arriving last evening. The ship,

(Testimony of H. E. Pennell.)

at time of abandonment, was full of water and wholly dis-masted and the crew on the ice.

The "Corwin," with the aid of her passengers and crew, pumped the "Catherine Sudden" out and brought her to this port. A survey has been held on her this day by the Capt. of the "Corwin," said survey consisting of Capt. A. H. Herriman, Capt. W. H. Ferguson and the Carpenter of the U. S. Revenue Cutter "Bear" and the said vessel has been condemned. The Capt. of the "Corwin" proposes to sell the cargo, which is wholly damaged, as per consignments according to manifest, also the vessel's hull. The advice for so doing by the Master and owners of the Corwin was from Capt. Tuttle of the U. S. Revenue Cutter "Bear" and considered for the best interests of all parties concerned.

Capt. Panno, by agreement duly signed, with the matter and owners of the "Corwin," agreed to pay the sum of $2500.00 U. S. coin, for the delivery of the launch, lighter and two surf boats at Nome which contract has been carried out by the master and owners of the "Corwin."

The master and owners of the "Corwin" demand that the $2500.00 must be paid or they will hold the launch and lighters, hence, as agent of your company, I have drawn draft on you for this amount, payable to the Pacific Steam Whaling Co., and have drawn draft in favor of the Master and owners of the "Corwin" on the Pacific Steam Whaling Co., as a draft on the Nome Beach L. & T. Co., could not be cashed in this place and I trust that

(Testimony of H. E. Pennell.)

you will honor my draft drawn on you on presentation. I shall hold lighters and launch until advice from our office that said draft has been paid; in the meantime will keep them employed as much as possible, placing their earnings at the credit of the Nome Beach L. & T. Co., and hope to wipe out this indebtedness in a very short time, but have drawn this draft you as I, representing the Pacific Steam Whaling Co., will not assume any responsibility as to the safety of the launch or lighters, but will endeavor, to the best of my ability, to protect them from any damage or loss.

Trusting my action in this matter will be approved by the Nome Beach L. & T. Co., I remain

Yours very respectfully,

OMAR J. HUMPHREY,

Agt. N. B. L. & T. Co.

P. S. Enclosed please find copy of protest made by Capt. Panno.

In addition to the foregoing papers there was included in said proof of loss, copy of the protest of the master reciting substantially the same facts set forth in his report to the company, duly sworn to, with the certificate of the notary in due form thereunto attached; also copy of bill of sale of the ship "Catherine Sudden" from its previous owners to the plaintiff: also, copy of certificate of enrollment of said "Catherine Sudden."

The witness, continuing, testified: This proof of loss and interest was made up as it is principally by counsel, but I worked with him more or less on it. I gave him

(Testimony of H. E. Pennell.)

data from the books of the company. It was made up at or about the time it bears date, in December, 1900. At that time I presume I had in my possession these various letters written by Captain Morine and marked Plaintiff's Exhibits 7, 9, 10 and 11, and dated, the first of them, Nome, June 24th; Nome, July 2d; Nome, July 18th; and the last of them, headed "statement of E. S. Morine, June 3d, 1900, to July 23d, 1900, as superintendent of the Nome Beach Lighterage and Transportation Company." I don't know why these were omitted from the proof of loss. I did not make up the form of total loss. I could not say until you said so that they were not there. I am not sufficiently acquainted with proofs of loss to know what documents were necessary. Mr. Frank determined what papers should go into this proof of loss. It is my best recollection that I submitted to Mr. Frank all the reports that were received prior to the time that this proof was made up. He has had possession of them right along, whether at that exact time I am not prepared to say now. I know I did not determine that those four letters from Capain Morine should not be made a part of the proofs of this loss. What papers should go in or should not go in was left to Mr. Frank. I was not present when the affidavit of Mr. O. J. Humphreys was prepared. I do not know who prepared it. I know nothing about it. I did not examine the affidavits of Mr. O. J. Humphreys before I handed the bunches of papers in which this was included to the defendant.

Mr. VAN NESS.—I desire to offer in evidence the original of the proof of loss which Mr. Frank hands me,

(Testimony of H. E. Pennell.)

or at least, for the purposes of this case, the original of the affidavit of Mr. Humphreys that was made. I want to offer the original papers with Mr. Humphreys' signature on it. I do that for the reason that there is an interlineation, or, rather, an exclusion by running a pen through certain words, which I did not read in reading the copy because of the exclusion; and I wanted to see the original first.

The COURT.—Very well.

Mr. VAN NESS.—Gentlemen, I will read the last sentence of that report signed by Mr. Humphreys, and then call your attention to it at this time. The copy that I read to you, with certain erasures, read as follows: "that the claim for salvage on said ship and cargo was much in excess of fifty per cent. of its value, and the salvors refused to surrender either ship or cargo." The original affidavit before there was any striking out read as follows: "that the claim for salvage—"

Mr. FRANK.—One moment. In the first place, it is very apparent, if your Honor please, that the object of this matter is to make a personal attack upon me inasmuch as the onus of what is attempted to be made to appear of retaining certain letters of that kind is cast upon me. The proofs of loss are themselves evidence only for what they report, and the condition in which they are. I have no objection to any or all of this testimony, provided, after the testimony is in, I be permitted to take the stand and testify in this case without thereby being deprived, under the rule, of arguing the case to the jury.

(Testimony of H. E. Pennell.)

If that concession is made, then I have no objection, for I have nothing to conceal. It is all subject to proper and rational explanation. But I do not want to be placed in a position where an imputation is cast upon me, and my mouth is shut up in answering it. That is all. Otherwise, it has no relation, no materiality in this case, whatsoever. The proofs of loss were furnished to them, with the erasure, whatever it may be. I make that explanation. I have nothing to conceal, but I repeat, I want it understood that if this testimony goes in, I be permitted to testify, without having my mouth closed under the rule that an attorney who testifies cannot address the jury.

Mr. VAN NESS.—I will say to your Honor—and it is only proper to suggest to Mr. Frank—what I am doing is not, because of my doing it, any imputation on Mr. Frank I am proving facts in the case. If the facts themselves, because of their being facts, carry any imputation, that is imputable to the facts and not to me. I have proved the omission of three or four letters of Captain Morine which contain statements which I consider very valuable to the defendant. I prove those were omitted. It is for the jury to draw any proper inference as to the omission. This question of the affidavit of Mr. Humphreys is not new in the case. It has been in the atmosphere many, many months, and long before these proofs were made, or, at least, about that time. It is my province, as well as my duty and my pleasure, to prove facts wherever I find them in the case, because I would rather have facts

(Testimony of H. E. Pennell.)

than statements. I would not want, under any circumstances, to close Mr. Frank's mouth, and I will say to him that I will not object to his arguing the case to the jury at length, when the time comes, because of his taking the stand and testifying.

Mr. FRANK.—Then I have no objection to anything going in.

Mr. VAN NESS.—Whatever rational explanation can be made of these matters will be all right. I want to call the attention of the jury to this affidavit as presented to the underwriters, "That the claim for salvage on said ship and cargo was much in excess of fifty per cent of its value, and the salvors refused to surrender either ship or cargo." As originally written, before it was changed, it read as follows: "That the claim for salvage on said ship and cargo was much in excess of fifty per cent of its value, and the salvors refused to surrender possession of either ship or cargo without payment of their claim." The striking out being of the words "Possession of," and the subsequent words "without payment of their claim."

Mr. FRANK.—The same interlineation was in the copy.

Mr. VAN NESS.—Yes, and that is what attracted my attention.

The witness, continuing, testified: Mr. Frank has the original salvage agreement with the "Corwin" people referred to in one of those letters.

Counsel for the defendant here read in evidence the

(Testimony of H. E. Pennell.)

agreement referred to, which is in the words and figures following, to wit:

This agreement made and entered into this seventh day of June, 1900, by and between the Corwin Trading Company, a corporation, owning and operating the steamer "Corwin," the party of the first part, and Captain J. L. Panno, the party of the second part;

Witnesseth: That whereas the party of the second part has in his possession and under his control one certain steam launch named "Dorothy" and one barge and two surf boats, together with fixtures and tools for operating the same, and whereas the party of the second part with said steam launch, barges and surf boats, are now adrift in the ice in Behring Sea and in great danger of total loss and destruction, and whereas, the said party of the second part desires the said first to furnish towage and transportation for said steam launch, barges and surf boats to Cape Nome, Alaska.

It is therefore agreed between said parties that the said party of the first part shall transport said launch, barges and surf boats to Cape Nome in Alaska and deliver the same to said party of the second part in the water at ship's side, the same to be put upon the beach by the second party. It being understood and agreed, nevertheless, that the said party of the first part does not guarantee safe delivery of said launch, barges or surf boats, or either or any of them. And it is further understood and agreed that in the event of any damage to said launch, barges or surf boats, or the loss of them, or either or any

(Testimony of H. E. Pennell.)

of them, that the said party of the first part shall not be held liable for any such loss or damage.

The said party of the second part agrees that in consideration of such services that he will pay to said first party upon the delivery to him in the water at Cape Nome of said launch, barges and surf boats, the sum of two thousand five hundred dollars ($2,500.00) gold coin of the United States. And also agrees to furnish his crew and equipment for literage for the purpose of landing the cargo of the steamer "Corwin" upon the beach at Nome upon the arrival of same.

And it is agreed between said parties that in the event of the loss of said launch, barges or surf boats that the said party of the second part will pay to said party of the first part pro rata of said twenty-five hundred dollars ($2,500.00), the same to be based upon a valuation of ($5,000.00) five thousand dollars for said launch and two thousand for said barges and surf boats. The payments under this agreement to be made on delivery of said steam launch, said barges and surf boats to the party of the second part at Nome in the water at the vessel's side. It being understood that the party of the first part shall retain possession of said launch, barges and surf boats until such payment shall be made, and in the event of delay in the payment of such sums as may be due under this agreement, it is agreed by the said second party that the said first party shall have the use of said launch, barges and surf boats until such time as payment in full is made.

And it is further agreed by said second party that he

(Testimony of H. E. Pennell.)

will furnish and provision a crew on board of said steam launch sufficient to steer and otherwise navigate the same, it being understood that said crew shall give all assistance possible, both in navigating said launch and in the transportation of said barge and surf boats.

In witness whereof the party of the first part, by its president, being thereunto duly authorized, and the party of the second party have hereunto set their hands and seals, in duplicate, the day and year in this agreement first above written.

(Signed) CORWIN TRADING CO., [Seal]
By F. W. HEUSTIS,
Prest.
J. L. PANNO,
Master.

Witness:

T. F. TURNBULL. [Seal]

The witness, continuing, testified: I got my first news of the loss, or rather of the arrival of the "Sudden" at Nome, off the Merchants' Exchange Board. I had my first interview with Mr. Davis, the agent of the company, right subsequent to the news of the arrival of the "Sudden" at Nome coming to San Francisco. I went to his office. In substance, I told him the vessel was in trouble, and talked the matter over generally. I do not remember whether or not, at that first interview, I had been informed of the arrival at Nome of the vessel and sale of the cargo. I subsequently learnt of these proceedings at Nome, the sale of the vessel and cargo. I saw Mr. Davis after that and presented him with the

(Testimony of H. E. Pennell.)

letters that I received. I am quite sure I gave him this letter, or read to him this letter of Captain Humphrey, dated June 11th. I cannot say positively whether I read that letter to him. My best impression is that I took the letter to his office. I cannot say whether I showed him the letter or told him its contents. I did one or the other. I simply told him that that was the information that we had from Nome; that we were notified as to the wreck of our ship. I have no recollection of having told him anything else in regard to the letter. I either showed him the letter or stated to him the contents of the letter. I handed it to him for the purpose of giving him such information as I then had. I believe we have a copy of the captain's protest here; that when I received it I apprised him of the fact that I had it, and either showed it to him or told him the contents of it. I showed him other papers received by me from Nome, other than this letter of Captain Humphrey, dated June 11th, and the Captain's protest; reports of Captain Morine. I cannot call to mind Exhibits 7, 9, 10 and 11, the letters from Captain Morine, but I can say this; from time to time I made Mr. Davis familiar with all the correspondence in relation to that loss that I had. I do not remember whether I showed him Captain Morine's letter marked Exhibit 7 or his letters marked Exhibits 9 and 10, or the captain's statement marked Plaintiff's Exhibit 11.

Q. You have no recollection of really having shown him any of the papers themselves, have you?

A. Yes, sir.

(Testimony of H. E. Pennell.)

Q. What paper did you show him that you can now recollect?

The witness, continuing, testified as follows: I cannot say at this time what paper there was, but as this information came in from the north, all of it was either taken by myself or sent to Mr. Davis for general information. I am quite sure that I sent one of those four letters or statements signed by Captain Morine to Mr. Davis. I cannot say which one, but I believe the first letter that I received from Captain Morine. I am quite positive that that was sent, and I think the others were sent, to the best of my recollection. I did not include the cost of the lighterage plant in the $9,168 of the cost of the beach outfit. As a matter of fact, the lighterage plant did not amount to sums in the aggregate approaching $6,000; nor did, independently of that, the balance of the cargo on board, the underdeck cargo, cost $9.168; but that is the amount, within about $1,100 or $1,200. The beach outfit was worth less by $1,100 or $1,200. In the beach outfit was what was shipped in the "Catherine Sudden" and what was shipped in another vessel. In other words, we shipped a steam engine and some odds and ends up with Captain Morine in the steamer "Thrasher," which was part of the beach outfit, and which arrived at Nome on the steamer "Thrasher." That is all charged in one account, and makes the aggregate of some $9,000. The value of that which was shipped on the "Thrasher" was about $1,200. The balance of it was on the "Catherine Sudden." The value of what I call the beach outfit shipped on the

(Testimony of H. E. Pennell.)

"Catherine Sudden" was approximately $8,000. That beach outfit consisted of all the cargo on the "Catherine Sudden" consigned to the Nome Beach Company, outside of this lighterage plant. That included the coal. I think this account here covers the greater part of the coal Captain Humphrey had. He bought coal during July, August and September. 14 tons are charged in that bill, 14 tons purchased from the steamer "Signal" at $35 a ton, the voucher for which that is on is dated September 30th, and it is a running account for the month of September.

Q. See if you cannot find some coal towards August, and tell us what the price was.

A. There is one on July 19th: 12 sacks coal, at a cost of $36.95. I do not know what proportion of a ton that would be; it would be less than a ton, I presume. That was as late as July 19th. I do not find anywhere those books, bills of account, letters, memoranda or anything else in my possession, in any place where we paid the price for coal mentioned by Captain Hibbard, anywhere between the 10th of June and the middle of October, when we stopped operating; that is, $17 a ton.

The witness, continuing, testified: I have heard it quoted as low as $17, the value Captain Hibbard mentioned on the stand, during that season; but of my own knowledge I do not know of any sale having been actually made at that figure. I do not think I ever wrote to Captain Humphrey any other letter than the letter I testified to as having been written by me personally in response to his letter of June 11th. I did write to

(Testimony of H. E. Pennell.)

him again between the time the "Catherine Sudden" got into Nome and the close of that season, away along it must have been in the winter of that fall; that is, in the winter of 1900 and 1901. I have forgotten whether Captain Humphrey was in Seattle or in San Francisco. That was subsequent to the time of his making this account. A copy of that letter was left at the Pacific Steam Whaling Company's office, because it was used by us to get a settlement with the Pacific Steam Whaling Company on this account of Captain Humphrey. I had no other occasion to write to Captain Humphrey at any other time in regard to these matters. Captain Humphrey made a charge against the Nome Beach Lighterage and Transportation Company for his services up there during the time that he acted for us. His charge was $2,500. He demanded $2,500 for his services at that time. We did not pay him any of that $2,500. We declined to pay it. That demand was contained in Plaintiff's Exhibit No. 15, and worded: "O. J. Humphrey, services rendered, $2,500."

Q. That $2,500 was the $2,500 that you spoke about this morning; that was included in this demand which you did not pay, and that reduced this debit balance?

A. Yes, sir, that and the other one that we afterwards brought out, $2,500 which he charged as having advanced on the lighters.

Q. That would be $5,000?

A. In other words, we got that money back again from another source, that we paid. He charged $2,500 for his services up there and $2,500 as money advanced

(Testimony of H. E. Pennell.)

on account of the lighters, we paid the $2,500 that he claimed he advanced. We got it back again, I mean the $2,500 for salvage. We paid that. We paid the draft when it was presented to us, and he has it charged in the account against us. We did not get the salvage money back.

Q. The $2,500 that he charged for services you never have paid, and no part of it? A. No, sir.

Q. State what reason you gave to Captain Humphrey at that time for not paying that $2,500 that he charged for services.

A. That the amount for such services as had been rendered to us was exorbitant, and that he representing the Pacific Steam Whaling Company, we presumed that any money owed for his services was owing to them, and not himself personally.

Q. In other words, you put your refusal to pay the $2,500 that he demanded for services upon the exorbitancy, as you thought, of the demand, and on the further ground that whatever compensation should be paid for those services was due to his employer, the Pacific Steam Whaling Company, and not to him?

A. Yes, sir.

Q. Did you pay to the Pacific Steam Whaling Company, or make any allowance to them for Captain Humphrey's services during that time? A. Yes, sir.

Q. How much? A. $500.

The witness, continuing testified: The Pacific Steam Whaling Company did not present a bill of account for it, and received $500 for the services that Captain Hum-

(Testimony of H. E. Pennell.)

phrey had rendered our company up there. These accounts in evidence show a balance to our credit. That balance was raised by $2,000. In other words, there was a balance to our credit, and then, by striking out from that the $2,500 that he had charged, the $2,000 we increased our credit by just that amount, and the other $500 was retained by the Pacific Steam Whaling Company for his services to us during this struggle. I do not know whether they paid Captain Humphrey anything additional for his services to our company at that time. I last saw Captain Humphreys about a year or a year and a half ago. I did not see him this summer when he was down here. I know that he was living at the Bohemian Club. I did not call on him during that time, but I sent work asking him to call on Mr. Frank some three weeks ago, through Mr. Howard. Mr. Howard reported to me that Mr. Humphreys had left for the East. That was about five days before this case came on for triai. I employed a man to hunt Mr. Humphreys up. I did not know his residence was at the Bohemian Club when he was in San Francisco. I sent to the California Hotel first. The only message I sent to him was one asking him if he was available and would call. I was present upon the occasion when Captain Humphreys and Captain Herriman were present with Mr. Frank in the rooms of the Board of Marine Underwriters. They were there and asked some questions of Captain Humphreys. I heard the questions asked and the answers Mr. Humphreys made. I do not know what the price of coal was at the time the "Sudden" arrived at Nome

(Testimony of H. E. Pennell.)

Beach. I know nothing about the value of coal up there at that time. The only information I have upon that subject and its value during the month of June is the price charged in Captain Humphreys' bill of $60 a ton. I know nothing about the cost of supplies such as those sent up by the "Sudden" of groceries and canned goods and things of that kind. During the months of June and July we bought a limited quantity of provisions for the purpose of operating this lighterage plant, but we had not the same number of men to provide for in this instance that we had in the beginning. I think our men were all boarded. I cannot tell from my recollection how the cost up there compared with the cost in San Francisco. It would be more. The registered tonnage of the "Catherine Sudden" was 556 gross, 515 net.

Upon redirect examination the witness testified: In speaking of the net earnings of the lighters and launch during Captain Humphrey's administration, it was practically $378.85. It remained that amount up to the time of my final settlement with Captain Humphrey. This settlement with Captain Humphrey was up to February 20th, 1901; so far as my accounts stood, from the time that Mr. Humphrey took charge of our affairs, up to February, 1901, the apparent net earnings of our plant during the time it was in Mr. Humphrey's possession was only $378.85. Previous to the time that the proofs of loss which were here placed in evidence, what is called the technical proofs of loss, and the letter of December 11, 1900, addressed to Spreckels & Co., was written, Mr. Davis had all the information that was in

(Testimony of H. E. Pennell.)

our possession regarding the loss. Mr. Davis came to my office respecting those matters before these proofs of loss were made out. All those matters were discussed between Mr. Davis and me in Mr. Frank's presence. I do not find in our books any memorandum of any purchase of coal whatsoever during the month of June, except the charge made by Captain Humphrey in the memorandum and account here in evidence. I found out that Captain Humphrey was in town from the result of sending out to find out whether he was in town. As soon as I found out that he was I sent a request that he appear at your office immediately, and I received word that he had left the city and gone East. The settlement with Captain Humphrey was in the middle of November, 1900.

NATHAN H. FRANK, a witness on behalf of plaintiff, being sworn, testified as follows:

With reference to this affidavit of O. J. Humphrey with the erasure upon it, I wish to explain precisely how this erasure was made and why it was made, the circumstances connected with it. In the preparation of these proofs of loss I had an interview with Mr. Humphrey, and took down what I thought he said at that time. He departed. I afterwards prepared this affidavit, intended to cover my understanding of what he said, and sent it to him for execution. He brought it back to me already executed, with the erasures made upon it here, striking out "possession of" and "without payment of their claim." I asked him why he did that,

(Testimony of Nathan H. Frank.)

and he said because this stated the facts and the other did not; that the salvors would not listen to anything except that they refused to surrender either ship or cargo, and claimed it all. That explains that erasure. I did not change it but passed it on to the underwriters exactly as it came to me. With respect to the preparation of the proofs of loss, and not placing into those formal proofs the letters referred to, I will state that the matter had been gone over. I had been first given to understand by my clients that Mr. Davis had everything that was in their possession, and I was led to believe that that was so from the fact that I had frequent interviews with Mr. Davis in which he showed himself perfectly familiar with everything that was going on. The object of these proofs of loss were not to furnish Mr. Davis any information that he did not have, but they were precisely what they purport to be upon the face of the letter that was written to him. This letter was drawn by myself: "We have heretofore placed before you all of the information which we could gather concerning the loss of the barkentine 'Catherine Sudden' and her cargo, and to that end have produced before your representative, at meetings duly called for that purpose at the office of the San Francisco Board of Marine Underwriters, all of the witnesses within our reach to the facts concerning said loss, and allowed you through your attorney to subject the same to such cross-examination as to him seemed best, at the same time exhibiting to you such documents as we thought would aid you in the investigation.

(Testimony of Nathan H. Frank.)

That there may be no question between us regarding the technical matters entitling us to payment of the aforesaid loss, we now take occasion to formally present to you herewith proofs of loss and interest."

To explain the reason why I did not go to any further trouble to include more in these proofs of loss; that is, because my understanding of the law is that the purpose of the proofs of loss was to furnish information to the insurer, so that he could determine whether he would pay it or not, and that Mr. Davis had all the information, and, if those proofs of loss did not contain all he wanted, he was at liberty to call for the rest, which he knew of. He knew where to find it. We were not furnishing proofs of loss for reinsurers, or anyone else. We were furnishing them as a technical proposition, to comply with the technical requirement of the policy between ourselves and Mr. Davis.

Upon cross-examination the witness testified as follows: I did not make the statement in open court since this trial commenced that when this written proof was furnished the Nome Beach Lighterage and Transportation Company had put in that proof all the information that they had. I stated tha at the time we put in these proofs of loss Mr. Davis had all the information that was in our possession to give to him. I did not know at the time I made those proofs of loss that Mr. Davis' interest in this loss was very small, provided he could collect from the reinsurers the amount that he had reinsured. I did not know that he had only $1,000 interest in the loss provided the reinsurers would pay. I

(Testimony of Nathan H. Frank.)

knew he was reinsured, but to what amount I did not inquire. I was not interested in the reinsurers at all. I did not know that at that time just before I made those proofs of loss that the reinsurers were taking the position that because of what they claimed to be the violations of this policy and, as they alleged, the fraud that had existed in Nome in regard to the sale of this "Sudden" and the cargo, that they were taking the position that the Standard Marine was not liable and would not recognize that loss. I knew that the reinsurers were opposing the payment of this particular loss, and that they were examining into it, and when I came around I was present at some interviews but they were not communicative to me on any subject connected with it. They were rather careful when I was present about what they said. I knew the reinsurers were contesting this loss. I did not make up these proofs and omit these letters of Captain Morine to the Nome Beach Lighterage and Transportation Company. They were omitted. Whether they were purposely or otherwise omitted I cannot now recall; it is so long ago. I had not the reinsurers in mind and had nothing to do with them at all. I was not called on to make and proof of them to or for the reinsurers. I was making proof of loss to my own insurers. I do not recall knowing anything about the Morine letters personally until a day or two ago when my attention was called to them by Mr. Pennell, and we went over them together. I am giving you the best of my memory in the matter.

Counsel for defendant here hands the witness a letter.

(Testimony of Nathan H. Frank.)

The witness, continuing, testified: I remember writing this letter after the whole controversy had finally centered down, and finally the suit—I do not know whether the suit was begun or not—after final determination, in parting between us, when we found that we could not get our money at all.

The letter was here read in evidence and marked Defendant's Exhibit No. 5, and is in the words and figures following, to wit:

Defendant's Exhibit No. 5.

San Francisco, May 13, 1901.

Messrs. J. B. F. Davis & Son, 215 Sansome Street, City.

Gentlemen: In re Nome Beach Ltg. Co. vs. Standard M. I. Co.

I have to acknowledge the receipt of yours of May 11th respecting the above matter.

Of course we have no desire to prejudice you in your relations with your re-insurers, neither do we think that anything that has heretofore occurred will place you in that position, nevertheless all admissions and waivers heretofore made by you, and acted upon by us, are beyond recall. They relate only to technicalities, and do not affect the substantial rights of the parties. You can understand that but for your waiver we would have taken the steps necessary to avoid those technicalities which your waiver relieved us of and which it has now become too late to remedy. Of coure it would not be fair to now ask us not to insist upon those waivers, and allow Messrs. Van Ness and Redman to defeat this

(Testimony of Nathan H. Frank.)

insurance on bare technicalities. If they have any substantial rights in the matter, so that in fair dealing between man and man, the insurance company should not be called upon to pay, those rights are not jeopardized by anything you have done, and we take it that that is all that can be asked in the premises.

Hoping that this may meet with your approval, I remain, Very truly yours,

Yours etc.,

NATHAN H. FRANK.

The witness, continuing, testified: I stand by that yet. I do not thing there is anything that I have done or said that in anywise counteracts that.

Counsel for plaintiff here offered and read in evidence the letter to which the above letter was a reply. Said letter is in the words and figures following, to wit:

Plaintiff's Exhibit No. 16.

J. B. F. DAVIS & SON,

General Insurance Brokers,

215 Sansome St.

San Francisco, May 11th, 1901.

Mr. Nathan H. Frank, City.

Dear Sir: We wish to inform you that Messrs. Van Ness & Redman have requested us to make you no promises as to what course they will pursue in defending the "Catherine Sudden" case in event of your clients bringing suit against the Standard Marine Insurance Company.

(Testimony of H. E. Pennell.)

Sometime ago you will perhaps remember that you asked the writer to make certain admissions, which he agreed to provided they would not jeopardize our company's interests as regards our re-insurers, and this is to advise you that the case has been placed in Messrs. Van Ness & Redman's hands and we cannot make you any promises or admissions unless they meet with the approval of our attorneys.

Yours very truly,

J. G. F. DAVIS & SON.

The said letter was marked Plaintiff's Exhibit No. 16.

Upon further cross-examination, H. E. Pennell testified as follows:

I have the copy of the letter I wrote to Captain Humphreys in reply to a letter he wrote to me on June 11th.

The letter was introduced and read in evidence, and is in the words and figures following, to wit:

"San Francisco, July 2nd, 1900.

Capt. Omar J. Humphrey, C/o Pacific Steam Whaling Company, Nome, Alaska.

Dear Sir: Replying to your favor of June 11th, addressed to the Secretary of our company, we beg to reply as follows:

We are extremely sorry to learn that Captain Morine is having such a serious time of it, and trust that by the time this reaches you, he may be in better shape.

The difficulties of our barkentine "Catherine Sudden" have been a great disappointment to our company.

(Testimony of H. E. Pennell.)

These things, however, are the fortunes of war, and must be met with as best they can. Under the circumstances, we know that no more satisfactory arrangement could be made than that which has been provided. Our company is pleased to learn that Captain Morine has appointed your good self to represent us.

Your draft for $2500.00 in favor of the Pacific Steam Whaling Company we paid on sight. We also wish to acknowledge receipt of Captain Panno's protest.

We feel easy with the knowledge that the affairs of our company are in good, safe hands, and notwithstanding the serious mishaps which have befallen us, we trust that our tug and lighters will still give a good account of themselves.

Thanking you, and hoping this finds you enjoying good health and doing well, and with kind regards to all our friends in the North, we remain,

Yours very truly,

NOME BEACH LIGHTERAGE & TRANSPORTATION COMPANY,

By H. E. PENNELL,

Secretary."

The reason I did not include a copy of that letter in these proofs of loss that I furnished the company in December was that I did not know I had it until night before last. I knew I had written a letter, but just what that letter was, or the copy, I really did not remember having in my possession until I found it the night before last. I cannot say that I had written approving of his appointment by Captain Morine. I had written him a

(Testimony of H. E. Pennell.)

letter. I had not forgotten that I had written the letter. I had forgotten the entire contents of it. I will say, further that I searched for that letter knowing that I had written a letter to him in response to a letter received, and was endeavoring to find it, and it bothered me for some time; and I finally came to the conclusion, as I stated in court, that it had been a matter of a personal letter, and I had not kept a copy, and I did not find it until night before last, and immediately when it came into my possession I notified the Court. At the time I made the proofs it was in my memory that I had written Captain Humphreys this letter that has gone in evidence. I have searched for it ever since the winter of 1900 at time when we were settling with Captain Humphreys, attempting to settle with him and the Pacific Steam Whaling Company, and I wanted that letter for that purpose in connection with that, and I sought for it diligently. It had escaped my memory where the copy had been placed and has never come to light until this time. It is likely I referred to that in a letter that they are now looking for in the Pacific Steam Whaling Company's office. I think that is quite likely. I think Captain Humphreys was not here during the winter of 1900. I think he was in Seattle and did not get down here until some time during 1901. I remember the time of the meeting at the rooms of the Board of Marine Underwriters, at the time you examined Captain Humphrey when I was present. That was possibly early in 1901. That was prior to my making those written proofs. The written proofs were made in December,

(Testimony of H. E. Pennell.)

1900. If I remember rightly then, I saw Captain Humphrey before that. I do not remember, but I do not think that I asked him at that time for the original of that letter, or for a copy of it. I was present in court the other day during the examination of Captain Colcord, but I do not remember exactly that he stated he had heard Captain Humphrey and Captain Morine both make certain statements in regard to this matter of Captain Humphrey's agency to my company.

At the conclusion of the witness Frank plaintiff rested its case.

TESTIMONY FOR DEFENDANT.

NATHAN H. FRANK was here recalled, for defendant.

I have not in my possession a certified copy of the proceedings of the District Court at Nome having relation to the wreck of the barkentine "Sudden" and the cargo of the "Sudden." I haven't any kind of a copy of those proceedings. I made every endeavor that I could get a copy of them, instructed my clients to do so, and they wrote to their agents for them, and I made several inquiries as to whether or not they got them, and never succeeded in getting them.

Counsel for defendant then read in evidence the deposition of ARTHUR M. POPE, taken on behalf of the defendant. The deposition was in the words and figures following, to wit:

I reside in San Francisco. My occupation is a miner. I was living in Nome, Alaska, in the month of June, 1900. I went there in 1899; lived there until I think the 13th of October, 1900. I remember the "Catherine Sudden" arriving at Nome in June, 1900, in tow of the "Corwin." I was at that time manager of the business of the Alaska Commercial Company at Nome. They were engaged in general merchandise business and shipping. I was at that time familiar with the then current price of lumber and coal.

Q. State, if you please, what the market value of coal per ton was during the month of June, 1900, at Nome, Alaska?

A. Well, in June—I should say for an average price in June, $50. I think I know approximately the highest price at which coal sold at Nome, Alaska, during the month of June. The highest price was reported to me as $60. I should say that approximately $60 was the highest price paid for coal during that month.

Q. Can you give us approximately and substantially the lowest price to which coal went, and at which it was sold during that month?

A. Approximately I heard of sales at $38.

(The witness continuing:) That is not of my personal knowledge. The report came to me in the usual order of business. I don't know of the actual transfer of the

(Deposition of Arthur M. Pope.)

coal of my own knowledge. I am basing my opinion on the general knowledge I had by virtue of my connection with the Alaska Commercial Company.

Q. In relation to lumber: Do you know at what figure lumber was selling per thousand feet at Nome, Alaska, during the month of June, 1900?

A. I sold lumber, I think, at about the highest price, for the general run of lumber, at $150 retail. I bought it at $85 at the ship's side.

Q. Would you say that $85 per 1000 would be a fair statement of the lowest price at which lumber sold during that month?

A. No, sir; it declined from that price toward the end of the month.

Q. At the time of the arrival of the "Catherine Sudden" and up to the time that the goods which were on board of her were sold at public auction there—you know of the public auction that was had of the goods.

A. I don't remember the date. That would have a very considerable bearing on the value of the cargo at the time.

Q. That sale was on either the 14th or 15th of June, 1900? A. I think on the 14th.

Q. Having in mind that date, can you tell us the price lumber was approximately?

A. Well, the retail price of lumber at that time, for general cargoes of lumber on shore, was $150 per 1000—as late as the 15th.

(The witness continuing:) As to larger lots, or cargo lots, I would say I bought a cargo of lumber of the "Sig-

(Deposition of Arthur M. Pope.)

nal," at ship's side, for $95. Dealing with the 14th and 15th of June, I would say a fair figure would be on shore $150, and upon vessel in the harbor $85 or $90. I was not present at the sale of the cargo of the "Catherine Sudden." I knew Mr. Omar J. Humphreys at that time, and had a conversation with him concerning the sale, before the sale, a day or two before. As far as my memory serves me, Mr. Humphreys represnted somebody in the matter, whom I cannot call to mind, and he wished me to bid in certain articles for these parties. They were lumber and coal. I am not sure, but I think there was some feed aboard the ship, or something of that kind. He did not make any price at which my bids were to be. He did not give me any names, but he said the charterers of the vessel. I did not go to the sale and bid in for him. I did not see my way to do it. I could not go there and bid on stuff, not knowing who was going to take it off my hands—something I did not want. The request was that I was to bid it in on behalf of the charterers, not that I was to retain it at all. I know nothing about the unloading of the coal that was on the "Catherine Sudden" after the sale. I know whom it was done by, but I had no connection with it. It was done by the towing company that Humphrey was manager of there, I believe the Nome Lighterage, or something of that kind.

Q. Was it the Nome Beach Lighterage & Transportation Company? A. That was it.

Q. Why do you say he did that for the Nome Beach Lighterage and Transportation Company?

(Deposition of Arthur M. Pope.)

A. I do not say he did it for them, that was the company he represented, and their vessels and barges were used in this transfer. I do not know it was at their behest.

I cannot approximate the quantity of coal he took off; I do not know that. I should judge from the time they were engaged in discharging that hulk there, it was considerable. Some of the lumber that was on board the vessel was taken out and brought ashore, but how much I do not know.

Q. Was it loaded on the barges, or floated?

A. They did both there in unloading lumber at that time of the year. I should say as a matter of opinion it was made into a raft and pulled ashore by the launch.

At the time the "Catherine Sudden" arrived the weather was very good. It was uniformly good for quite a period, I cannot exactly say how long without refreshing my memory, but there was one big storm, one big blow during June. I really do not know how early or late in June.

Q. Was not that storm that you refer to in August?

A. That was the largest; that was what is known as "the big storm." The one that I refer to as having occurred in June, was after the arrival of the "Sudden." It had no effect on the "Sudden" that I know of. I arrived there on the 13th of August, 1899, and was there through the summer of 1900. I arrived back in Nome in May, 1901, and left the latter part of October. Speaking from my experience with the summer of 1900 and

(Deposition of Arthur M. Pope.)

1901, in June and July, ordinarily speaking, the weather is very favorable—very good.

Q. During those months is there any reason to anticipate a storm or blow that would drive a vessel from her anchorage during those two months, speaking of ordinary conditions there?

A. No, sir; I should say not—not to drive a vessel from her anchorage.

Q. That is what I am asking.

A. It is very improbable.

(The witness continuing:) I know nothing about the unloading of any other portion of the cargo of the "Catherine Sudden" in addition to the lumber and coal. I do not know what it was composed of. I do not know what became of the coal or the lumber.

Cross-Examination.

Previous to going to Nome I was a miner in Alaska, and purser for the Alaska Commercial Company on the Yukon river. Previous to going to Alaska I was a merchant and commercial traveler. I have been to sea a good many times. My experience of the sea has been entirely as a passenger. I am not a seafaring man. I know nothing about navigation, or matters attendant to it. My first experience in Nome was from the month of August, 1899 to October, 1900. Then I came to San Francisco and returned in 1901, leaving here on the 24th of May, and arrived there around about thirty days—twenty-four to thirty days thereafter. I believe our passage was some twenty-six days including stops.

(Deposition of Arthur M. Pope.)

Q. You were there from August, 1899 to October, 1901, were you not? A. Yes, sir.

Q. That includes June, 1900? A. Yes, sir.

Q. Then you came out and went back the following year and arrived in the middle or end of June?

A. Yes, sir.

Q. That was in 1901? A. Yes, sir.

Q. And June, 1902, has not yet arrived?

A. No, sir.

Q. So, you could not possibly have been in Nome during the month of June at any other time except in June, 1900? A. Yes, sir.

Q. Yet you attempt to testify here as an expert upon what weather might reasonably be expected during that month at Nome, out of that single month's experience. Is not that that sum and substance of it?

A. I did not know that I testified as an expert on the weather. * * *

Q. Then you do not wish to be understood as being an expert on that matter, and that all you know about it is the knowledge that you derived from that one particular month when the "Catherine Sudden"—

A. (Intg.) Are you speaking of the weather during June?

Q. Yes.

A. That is all I know of the weather in June, by actual experience.

Q. That is all you know might be expected that month?

A. I could not be expected to say that is all I know

(Deposition of Arthur M. Pope.)

from my actual experience, because we have at every station a carefully kept record of weather. In view of this beach, we try to inform ourselves as much as we can of the probabilities of the weather, which is very shifty.

I have no knowledge that Mr. Humphrey was the agent of the Nome Beach Lighterage and Transportation Company except through general report. This lumber was taken ashore during the month of June. I have no date fixed in my mind, I do not know when it was. I have nothing to fix the date in my mind. I was not present at the sale and do not know whether the lumber was taken out before or after the sale. I should say some of the coal was taken out before the sale, I would not be positive. I have got nothing at all to fix it in my mind, and this is a sort of general indefinite impression I have got about it. I do not know whose coal it was that was being taken out. I do not know who the lumber belonged to only what I was told by Captain Humphrey, that it belonged to the charterers—the charter-party, I believe, was the term he used. I have no idea about the quantity of the lumber or about the quantity of the coal that was taken out. I had a small quantity of coal for sale in June, 1900, something less than 10 tons. I sold it during the first ten days of June for $50, that is all the coal I sold in June. It is a fact that just before the arrival of the vessels there coal was very high, and that then it came in very large quantities and immediately dropped. With the opening of navigation it dropped. The price that I referred to is

(Deposition of Arthur M. Pope.)

the price that was current there after the opening of navigation. Our first vessel was there in May. Around about the first of June they came in good and thick, and it was about the first of June that the price of coal began to drop, and even a little before that in anticipation of the arrival of the coal. I sold considerable lumber up there during the month of June, during the last half of the month. During the early part of the month I sold 3,000 feet for one party.

When I give the prices of lumber I do not have in mind any particular kind of lumber—that is, being redwood, Oregon pine, or some other sort of lumber. All lumber was alike up there at that time, with the exception of box lumber; that sold as high as $400 per thousand. The price of coal that I have given was the price before the opening of navigation. I know of no sales of coal. Coal was very well sold out in Nome, and the only coal that came to the market before the vessels brought a new supply was this little overage I had. I know of no sales between the highest price of $60 and what I sold at $50; $38 was the lowest price I know of. That was after the drop had taken place, after the supply had come in.

Counsel for defendant then read in evidence the deposition of VIRGIL MOORE, which was in the words and figures following:

I resided at Nome, Alaska, during the month of June, 1900, I went there originally in the summer of 1899, arrived there in September, 1899, and remained there continuously up to and including June, 1900, until the last

(Deposition of Virgil Moore.)

boats, the 21st of October, 1900. I was placer mining, coal mining, and buying and selling coal there. I am not as familiar with the prices of coal in June as I was later, except what coal I bought for my own use.

Q. From whatever information you have, do you know what the price of coal was during the month of June, 1900? A. Yes, sir.

(The witness, continuing:) Before the first boat came in in June, coal was very scarce at $5 a sack, and from $100 to $125 a ton. After the first boats came in it cropped somewhat. On the 21st of June we bought a ton of coal for $90.

Q. What was the prevailing rate at that time, say on the 21st of June for coal, in large or small quantities?

A. Well, it is owing to the quality. There was a lot of coal sold for $20 in June. Slack coal that was on the beach, and the waves had washed over it, and the sand had drifted through the sacks and ruined the coal.

Q. Would the sand have any effect on the coal?

A. Sand and water together.

Q. How about water without sand?

A. Water without sand would not affect it. I do not think water in the hold of a vessel at sea would hurt it, I never heard of its hurting it. Coal of good quality that was not injured by sand or otherwise, the prevailing price for that coal up to the 21st of June was from $75 to $100.

(The witness continuing:) During the winter we could not buy lumber at all for $400 a thousand. I paid $400 for it. The first boat that arrived was the bark "Alaska," and her cargo sold for $250 a thousand feet. In the lat-

(Deposition of Virgil Moore.)

ter end of May and the first of June. She got in very early; then lumber began to drop, but certain kinds of lumber remained up, 2 x 4 scantling was very scarce—heavy lumber was very scarce. I could have bought the ordinary lumber for $85 a thousand in June; it was very plentiful, but the 2x4's, and the heavy boards were so scarce that it went up to $250. There was a big job lot sold in June for $85, about an eight or nine thousand lot was bought in by Mr. Nestor. I would say that this job lot at $85 was the lowest price to which lumber went during the month of June, 1900. I remember the arrival of the "Catherine Sudden." I was interested somewhat in that. I might say I was practicing law during that time, and selling real estate and other things. I had a friend who came to me to look out for his interests on a consignment of goods on the "Catherine Sudden," a man named Thomas Pelky. He had a saloon outfit aboard, and some 8 or 10 bbls. of whiskey, and high wines, and different kinds of liquors, and he expected to lose them all. I was very well acquainted with the Corwin people, the salvors of the "Catherine Sudden," and I interceded with them to save Mr. Pelky's goods, if possible, and when the sale took place I attended the sale. It was a public sale, in the middle of the street, not in the main part of town, but pretty well down, and no one seemed to know what they were bidding on, or why they were bidding, or the condition of the goods, but Mr. Pelky succeeded in saving his goods, ten or fifteen thousand dollars worth, for $900, I think, but I am not certain. I did not make the bid for him, another party made it at my instigation. I don't know

(Deposition of Virgil Moore.)

whether it was $600 or $900, but I know it was a very low bid. I could not arrange with the Corwin people at all. We had no court or law there at that time; there was only the military authority there; there was a municipality by consent of the people. I was on the Chamber of Commerce at that time, and a committee representing the owners of these goods came before the Chamber of Commerce and remonstrated against this sale, and through Lieutenant Jarvis in the Board of Trade there, and through this Chamber of Commerce we had the sale set aside. I do not know whether it was subsequent to the sale; I know there was a remonstrance, and it was about the time of the sale. They maintained that the money should be put in escrow. I went to the Corwin people and asked them what they would release Pelky's goods for, and they said the only thing they could do was to have him come and bid his goods in at the auction sale. When his goods were offered, we had no way of knowing them, they had not been advertised, or anything like that, but Pelky knew his own goods, and he bid them in. There was no statement made by the auctioneer, or anybody else, as to the condition of the goods, or what the goods were. There were very few outside bidders and purchasers. The people who did attend were those who knew what the goods were, and attended; those who were on the inside; those who were on board and knew the goods; principally the owners of the goods and the consignees of the goods. I do not know that Captain Humphrey was there. There was no general bidding from the

(Deposition of Virgil Moore.)

inhabitants of Nome. We did not know what it was. I cannot recall the various steps taken after the "Sudden" came in in regard to giving notice of that sale and making the sale, only Mr. Pelky told me the sale would take place on this day. I do not remember seeing any advertisement.

Q. Was there anything done or said by any person there that might give any light to any person unfamiliar with the goods on the ship, as to what the consignments were, what the goods were, or what condition they were in? A. I did not hear anything of the kind.

Q. Was there any bidding by outside people generally, other than the few people who were generally interested in it? A. I think not.

Q. Now, in regard to the unloading of the "Sudden," do you know what was done?

A. The "Sudden" was very low in the water, and was dismasted, and I remember seeing double-ended dory boats; they would take long strings of them out there with a little tug-boat, and load goods on them. I think after the sale those who bought in goods would take out lighters of their own, or hire them, and go out and remove their own goods.

(The witness, continuing:) I know Captain Omar J. Humphrey, by reputation. He was up there. I think he did most of the work in getting the goods out of the vessel, and from the vessel to shore. I think he owned the tug "Dorothy." Lighters were very scarce there; Dories are double-ended boats—surf-boats. These goods were landed down on the beach, from Nome south, about

(Deposition of Virgil Moore.)

a mile from the main part of town, most of them, and some of them by the Nome Beach Lighterage Company's warehouse. I was in the immediate vicinity of the "Sudden" while she was being unloaded. I didn't pay any particular attention to how they got the goods from the "Sudden" on to the dories, I rather think they took them out by hand. I do not remember seeing any machinery on board of her. She was dismasted; all her rigging was torn away.

Q. What was the condition of the weather up there to the time she was unloaded?

A. We had a very bad storm in June.

(The witness, continuing:) I do not remember whether it was before she got in, or after. It was the one that the "Alaska" came ashore in. After that the weather was perfect until September. The "Sudden" did not go ashore in that storm. I think it was on the 11th of September that she did. Up to that time she remained at her anchorage, the weather being perfect from June until September.

Q. Do you know, from your familiarity with that country up there, what character of weather is expected during the months of June and July?

A. Good weather. There might be an occasional storm, you can't tell, but the general weather ought to be good in June and July.

On cross-examination, the witness testified as follows:

The portion of the cargo that my friend bought was whisky. It was done up in barrels, and was water-tight and would suffer no injury whatsoever from being sub-

(Deposition of Virgil Moore.)

merged. It was not any part of the cargo belonging to the Nome Beach Lighterage & Transportation Company. It belonged to my friend Pelky.

Q. In regard to the rest of the purchasers there, you say they were the purchasers there, do you know anything about that as a fact, or is it simply an assumption?

A. I was prepared to buy coal, and lumber also, as was also my friend, Mr. Nestor, but we had no way of knowing the condition of the cargo, and we did not bid.

Q. You do not know whether it was bid in by the parties interested, or whether it was bid in by others? All that you know is, you were not prepared to bid?

A. That is all.

Q. And you don't know that the Nome Beach Lighterage & Transportation Company bought in this cargo at all, do you? A. I do not.

Q. So, in this testimony that you have been giving, you do not wish it to be implied that you are saying that the Nome Beach people bought in their own cargo?

A. I know they and others interested, they and the consignees—the outside public had no chance to buy anything.

Q. You say "they," the plaintiff is a corporation.

A. Yes, sir.

Q. Who do you mean by "they"?

A. We looked at it as a game of the ring of those on the "Corwin" and these people, that the outside public were not given a chance.

Q. Do you know who represented the ring?

A. Captain Humphrey, I presume.

(Deposition of Virgil Moore.)

Q. You do not know, you have no legal knowledge of it? A. No, sir; I have not.

Q. You don't know anything about it, as a matter of fact?

A. I only know the firm, and by the reputation of it.

(The witness, continuing:) I knew that Captain Humphrey was the representative of the Pacific Steam Whaling Company. I knew Captain Morane very well. At that time he had a swelling on his neck, a cancer; he was sick in bed; I did not see him about; I did not see him there at all. I thought the representative of the Nome Beach people was Captain Humphrey. I don't know why why I formed that opinion; it is an impression that I received in Nome that he was connected with that Company. I wanted to buy a tug-boat and I went to the Nome Beach Lighterage and Transportation Company at their head office. I don't know who I met there, but I wanted to buy their tug-boat the "Dorothy." I think Joe Dwyer had her in charge; he had something to say about her. That was a month or so afterwards along in September I presume. I went to all lighterage companies to get the ship "Tasma" lightered. That is how I formed my impression. That was in July, August and September, not in June.

Q. And you do not know anything about who represented them in June?

A. I have not sufficient knowledge to express an opinion on that.

Q. When you say there was a ring there, that is an impression, and that is also formed in the same way?

(Deposition of Virgil Moore.)

A. From hearsay.

Q. And you do not know, and you are not prepared to swear to it as a fact?

A. I went to guard my friend's interests, Mr. Pelky, and I presume it was largely on what he told me that I based my conclusions.

(The witness continuing:) I did go to the Corwin people, though, and tried to get them to release my friend's cargo upon some terms, allowing them for the salvage of it. I went to Mr. George O. Fogg I wanted to release it allowing them to arrange for their salvage, and they refused to do it. I did not make any strenuous effort to make such an arrangement, I merely went to Mr. Fogg and he told me this sale would take place.

Q. You already testified that you went to him and tried to arrange for it, and he said he could not do it, that you would have to attend the sale and bid it in?

A. He said he had no power to do that.

Q. Did he not tell you, you would have to attend the sale and bid it in?

A. Yes, sir.

(The witness continuing:) I did not go to anybody else representing the Corwin Company. Mr. Fogg was the treasurer, I think?

Q. You say you rather think Humphrey took most of the cargo out with the "Dorothy." Is that based on actual knowledge, did you see him at work?

A. I saw him at work at it from time to time.

Q. How many times?

(Deposition of Virgil Moore.)

A. Well, there was a large number of vessels there, 40 or 50. I was figuring on buying a vessel at that time, and I used to go around there watching them. I bought some lighters and tug-boats of my own. I saw him working on the "Catherine Sudden" occasionally.

Q. How often?

A. For a short time on several occasions.

Q. And this was after the sale had taken place, was it not? A. Yes, sir, I think it was.

(The witness continuing:) I could not state what quantity he took out, I only spent one June up there. I came to the conclusion that good weather is generally to be expected there in the month of June having this single experience, because I could hear what people said about the year 1899. I was there in 1900, and I was there in the ship business in 1901, and I am engaged there yet in that business, and naturally made inquiries. I made them of people who had been there during those 3 years, about the weather. All I know about it is hearsay. I was in the newspaper business before I went to Nome, and also practicing law in Portland, Oregon. Previous to that I had been in a good many businesses. I had never been in the coal business before I went to Nome, and I know nothing about coal except the experience that I gained there in the years 1900 and 1901. At Nome I had coal to handle there that had been submerged. We used to always get it wet. We had two lighters sunk—40 tons each. The coal that we mine sometimes lies in water all year, and it doesn't hurt it. I don't know about outside coal. I mined it 200 miles out of Nome,

(Deposition of Virgil Moore.)

in salt water, in the Arctic Ocean. We were able to sell all we could dig. We dug 1500 tons in 1900, and disposed of it.

Q. At $100 a ton that is better than gold mining, is it not?

A. I think it is. I won't say I sold it—the Steamer "Corwin" took down 300 tons, and the Steamer "Bessie K." 150 tons, and the United States survey boat "Patterson" bought several hundred tons.

Q. But you didn't have anything to do with that coal?

A. It came from our mine.

Q. But you didn't have anything to do with the selling of it.

A. All that came down I had to do with. I bought the cargo of the steamer "Tacoma"—Roslyn coal.

(The Witness continuing:) I saw some of the coal that came out of the "Catherine Sudden." I could not say as to the quantity. I saw a lot of it piled on the beach when it first came there. All of 20 tons, I don't know exactly how much. I know there was a large amount of it piled up in the Corwin Trading Company's yard. I should think there would be 75 tons of it. I know that it came out of the "Catherine Sudden" because I saw some lightered ashore from the "Sudden," one or two lighter loads, and I examined it. That is all I am certain of that came from the "Sudden." They are big lighters, carrying 20 to 40 tons. I would not swear positively that I saw but one lighter load. It might have been 20, or 30 or 40 tons. It was a lighter load. I was not paying much attention to it. That was deposited

(Deposition of Virgil Moore.)

on the beach. I could not state how long it lay there. I made no particular examination of it, I staid there while they unloaded it. I was just walking by, I don't think I remained but a few minutes. I stopped and looked at it, we all looked at the coal, to see where we could buy coal cheapest. I was just walking along, and just took a glance at it and walked by, stopped maybe five minutes. I do not know to whom that coal belonged, whether to this plaitiff or some of the consigees aboard that vessel.

Upon redirect examiation, the witness testified as follows:

The Corwin Trading Company is still doing business at Nome.

Q. Now, speaking of this sale, in what way were the lots that were offered for sale described. How were they described to purchasers and bidders?

A. There did not appear to be over fifty people there. I was on the outskirts of the crowd, talking to Mr. Pelky and a friend, and did not pay any particular attention to the auctioneer. I listened, but could not make head or tail of it, until finally Pelky said, "These are the goods."

(The witness continuing:) He had a sheet of paper in his hand, the manifest of the vessel, I presume, and from that he read what was about to be offered. The coal that came out of the "Sudden" was merchantable, that which was not placed on the beach and allowed to get ruined. That is where it got ruined. As it came out

(Deposition of Virgil Moore.)

of the "Sudden" itself, and as it landed, it was in good condition. I observed the lumber, and some of it was a little blackened with coal dust, and some was wet. It would sell readily at that time; it did sell, as a matter of fact, in the market at Nome, most of it.

Q. At current rates?

A. I rather think so.

Q. Well, do you know about that?

A. Mr. Nestor bought it all, and it was destroyed in the storm of September 11th. My understanding is that he bought it at private sale.

JOHN L. PANNO, a witness called and sworn for defendant, testified as follows:

I am a master mariner. I have been a commander of sailing vessels. I was in command of the "Catherine Sudden" upon her voyage from San Francisco to Nome in May and June 1900. I do not know how many tons of freight the "Sudden" had on board upon that voyage. It was loaded and stored on the vessel in the usual way. I think the biggest lot of the cargo was coal. It was in small lots for A, B, C, etc. There was not a great deal of lumber. The heaviest part in one lot was coal. We sailed from San Francisco on the 28th day of April. The vessel was not down in the water more than usual. She was properly loaded. As a mariner I considered it a late date to start for Nome Beach. Vessels had gone ahead of us, the "Thrasher" and the "Pitcairn," and several others—I cannot remember the names; and

(Testimony of John L. Panno.)

most all the steam vessels had gone ahead of us. The "Thrasher" was a steamer and the "Pitcairn" was a sailing vessel. The "Rube Richardson" was a sailing vessel. The "Pitcairn" left some time in January or February. We overtook her on the way up. She had two or three months the start of us: I found her in the ice, The Unimak Pass is located at the entrance to the Behring Sea. We passed through Unimak Pass into Behring Sea. We went through the pass about the 1st of June. We did not come in sight of ice until after we got to Unimak Island. I think that was about two and a half or three days from Unimak Pass. The ice was about five miles away when I first sighted it. It was about five o'clock in the afternoon then. It was on the lea beam. It was to the left of us. The ice was in small pieces, as big as this room and bigger. They were floating pieces, broken ice. Some of them were about level with the water and some of them eight or ten feet high. It is generally understood that the largest part of a chunk of ice is that below the surface of the water. I had no idea how far below it extended. Some of these small chunks that I noticed floating about were a quater of a mile, a mile and five miles apart. They were not very numerous. I sailed right on and did not turn around and go back. My object was to get through it. When I got to the ice itself I found leads once in a while. Perhaps to-night I would be all inclosed with ice, ice all round us so we could not move any way, but during the night that ice would move, and

(Testimony of John L. Panno.)

perhaps in the morning at 8 or 9 o'clock we would have a lead of four or five miles that we could sail through. But around these leads, on each side and forward it was full of ice. The ice got thicker as I proceeded. I sighted a lot of vessels at about the time I first struck this ice in Behring Sea. They were all in the same position that I was; some steamers and some sailing vessels. The "Pitcairn" and the "Rube Richardson" were sailing vessels, both bound for Nome with the same kind of cargo that I had. We were all trying to get there as soon as we could, as early as we could get there. We wanted to market our goods. The next morning after sighting the ice it was broken but rather larger, larger in proportion. I do not know whether it was any thicker; it was about the same height out of the water. It was thicker as to the pieces being closer together. I kept on sailing through it all that day and all the next night. On the third day we could not get through it. We got in a lead and we could not get through. I tacked ship and stood back again and found a lead I suppose 10 or 15 miles. I went right into it, still fighting to get up to Nome. I did not get through that lead; I got up about 10 miles and fell in with the "Portland" and another steamer. I fell in with two steamers and stopped in the ice with them, made fast to the ice and lay there two days. They were stuck in the ice. We lay there until we got a lead and kept working up through it. We continued four or five hours after we got out of the last pack before we were stopped again.

(Testimony of John L. Panno.)

In the next lead I was in the company of two steamers, and the steamers left about 4 o'clock in the morning ahead of me through that lead and went on through out of sight. I got under way about 8 o'clock in the morning and started after them, and at about 11 o'clock, or 10 o'clock, I hit a piece of ice. The ice did not hit me; I hit it. My vessel ran into the ice. She hit it and knocked her bow in, something like that desk there (indicating). There was a piece of ice which I supposed I would go clear of, and down under water it stuck out like that desk, and hit her bow down under water. The ice was great deal harder underneath than it would have been on top. It looked like fresh-water ice. The moment I struck the ice there was a hole in my bow. As soon as I felt her hit it I put her bow on a cake of ice, so as to catch her there, so as she would not go down. I put my colors down, put the Union down in distress. When they sighted me they came down and stopped; that is the "Richardson" and the "Pitcairn"; they were coming down the lead astern of me, and they came up and made fast with me, one a little further off than the other. I signalled them for help. Some of the people from the "Richardson" and the "Pitcairn" got off their vessels and got on mine. They lay by me until I got towed away by the steamer. The people from the "Rube Richardson" and the "Pitcairn" took some of the goods off the "Sudden." They were our stores from between decks, mostly flour and lard, and such things as that, and I gave them leave to take them.

(Testimony of John L. Panno.)

I found the vessel was filling full of water, and it would be spoiled, and I gave them leave to take them. These stores were put away on the "Sudden" in the between-decks. The "Sudden" had two decks; below that was the hold of the vessel. These stores and provisions were on the second deck. There was nothing on the upper deck in the way of provisions. I made no distinction as between the provisions or stores belonging to the Nome Beach Lighterage and Transportation Company and those that belonged to other shippers in giving them permission to go on board and take provisions. The men that had the other stores, their goods were all marked. They took perhaps altogether ten tons. Most of these belonged to the Nome Beach Lighterage and Transportation Company. I told the "Rube Richardson" people to take these goods after they had taken them to Cape Nome, and what salvage there was on them we would pay it. The "Pitcairn" people—all of our crew and everybody was board the "Pitcairn"—I did not say anything to him because I thought they would eat them all up, as we would be there four or five days. The "Corwin" came in sight next day and pumped the water out of my ship and took it in tow and carried us to Nome. I made an arrangement at that time with the "Corwin" people with regard to the lighterage plant that was on board. There was a written agreement signed at that time as between myself and the captain of the "Corwin," or the agent or whoever was; I think Captain West was captain. This was signed on board of the "Corwin" before they started.

(Testimony of John L. Panno.)

It was drawn up and written after I had talked with the "Corwin" about the terms on which the lighterage plant was to be taken to Nome. I made no arrangement with the captain of the "Corwin" as to what he would charge for taking the hull of the "Sudden" to Nome. I made no arrangement with him at that time as to what he would charge for taking the cargo belonging to the Nome Beach Lighterage and Transportation Company to Nome. I did not enter into any ararngement with the captain of the "Corwin" at that time, or with anybody else on board of the "Corwin" at that time, as to what should be charged for saving anything except the lighterage plant. I did not expect, and they did not expect, to save anything when they commenced on it. So I could not make any arrangement. I made no arrangement with them as to what the salvage service should be, or what the payment for it should be. The written agreement was signed before the water was pumped out of the "Sudden" and they started to Nome. After they got the water pumped out of the "Sudden" and got her up so that she could be towed, between that time and the time that we got to Nome I did not enter into any arrangement with anybody on board of the "Corwin" looking to an arrangement of the charge they should make for salvage services for saving the goods on board of that ship.

We arrived at Nome on Sunday, I think the 10th. In my report I said the 8th, but it was wrong. I supposed at the time I arrived at Nome that the agent of the

(Testimony of John L. Panno.)

Nome Beach Lighterage and Transportation Company was Captain Morine. I knew before I left here and before I got there that it was Captain Morine to whom I was going to report. I did not see Captain Morine at any time after I arrived at Cape Nome and within the next two or three days. He was so sick that he could not be seen. I tried to see him, spoke about it, and they told me not to go there, that he could not be seen. I was not permitted to see him. I was told that the business would be done by the Pacific Steam Whaling Company. Captain Herriman told me that. I told Captain Colcord. I suppose he is one of the stockholders of the company. I met him the day after I got in. I do not think he said anything to me concerning who was acting for the company at that time. I didn't have much talk with Captain Colcord about the "Sudden" and her cargo. I had a talk with Captain Humphreys. I met him when I first went ashore. On Monday about noon, or I should say about 10 o'clock, I saw Captain Humphreys. I had a little talk with him at that time. I cannot remember the conversation. I remember I said to him that the "Corwin" people said they were going to take the whole of it. He said "We would see." He did not tell me what he was going to do. I had more or less conversation with him between that time and the day that the cargo was sold. I do not remember those conversations exactly. There was so much talk there that I could not remember. Captain Humphreys never suggested that he and I go together and

(Testimony of John L. Panno.)

see the managing agents of the Corwin Company at that place. I think there was no one there; there was nobody to see. I never succeeded in finding anyone there that was representing the Corwin Company, nor in finding any office occupied by the Corwin Company, unless it was as I understood with the Whaling Company. The Corwin Company and the Pacific Steam Whaling Company were separate companies. I don't know that the office of the Corwin Company was in the same place as the office of the Pacific Steam Whaling Company. The Corwin people had no office there to my knowledge. I know that the Corwin people represented themselves. They were all owners, and they had a bit of a place about two miles from the Pacific Steam Whaling Company down the beach; they had a lot. I think they had an office there, if I remember right. I was down there a dozen times while they were there. I never went there with Captain Humphreys. He never suggested that we go down and talk to the Corwin people; nor did I. We did suggest to each other to do something so far as the Corwin people were concerned to overcome their proposition or their disposition to take the goods and sell them. We did not do anything about it. There was no one to go to except ourselves. We had to let them fight it out. They told me they were going to take it; and even they would not allow me to take some butter that I wanted for the men. They said they owned the whole of it. I did not do anything after the Corwin people told me they were going to keep the

(Testimony of John L. Panno.)

goods, outside of talking to them, looking to making an arrangement with them to get the goods out of their possession. I had no resort to do anything. They told me they found the goods adrift without anybody aboard, and that they should claim the whole of it. I never asked them to name a sum of money that they would be willing to accept as salvage for that cargo if I could raise the money and give it to them. I told them I thought that the goods ought to be landed and sold and the proceeds put into some bank until there was a law come there that would settle their claim. They said they did not propose to do it that way. That is all there was to it.

When the "Sudden" got into Nome I was on board of her. I remained on board of the "Sudden" after the "Corwin" took her in tow at this place in the ice, until she got into Nome. The launch "Dorothy" was towed in by the "Corwin." I do not know where the "Corwin" people got the coal with which she fired her boilers for the purpose of hauling this tow into Nome. She took some coal off of the "Sudden" to lighten the "Sudden." I could not tell you how many tons. It was to lighten the ship. What they took aboard of the steamer and took up out of the forehold and put aft on the "Sudden" so as to tip her bow, was about 50 tons. I cannot give you any idea how much they took out and took on board of the "Corwin." It might have been 10 or 15 tons. That is a rough estimate. After the "Sudden" anchored on the beach the "Corwin" cast her anchor. They

(Testimony of John L. Panno.)

anchored a quarter of a mile apart perhaps, to give her a good berth in case the wind came up and not to get foul of one another; a good fair berth. She stayed that close to the "Sudden" until after the time of the sale. They did so in order to see that no one got aboard and took out any of the cargo; I presume. I remained on board of the "Sudden" afterwards until she was sold. When she was sold and the other parties bought her, they said they did not want me any more. No one remained with me until after the sale. The crew went ashore, most of them. After the sale I was notified I no longer had any business on the "Sudden." No one up to that time had asked me to leave. I do not remember the day I passed through the Unimak Pass. I think it was 24 days from San Francisco to the Pass. The entry in the logbook under date of May 30th, is in my mate's writing, with my signature attached to it. At the time I signed my name to the log I suppose I knew it was correct.

The entry was read in evidence and was in the words and figures following, to wit:

"Wednesday, May 30th, 1900. First twelve hours moderate breeze and fine pleasant weather, all sails set, light frost and feezing through the night. From noon to six P. M. light cloud weather, wind hauling to E. S. E. At seven P. M. run into large fields of drifting ice. At ten P. M. furled all light sails and hauled the foresail up, running through ice all night. Pumps, side-lights, look-out, attended to. J. L. Panno, 32 days out."

(Testimony of John L. Panno.)

The letters "E. S. E." mean "east-southeast." The fact that the weather was freezing throughout the night in that latitude and in that season of the year indicated that we were amongst the ice, that we were close to the ice or in amongst it—which we were. I have been going to sea fifty years. I never sailed on the "Catherine Sudden" before this trip. She was about a middle-aged vessel. A vessel of that character has a running operative life of 25 or 30 years, if she has been taken good care of. I do not know what the age of the "Sudden" was. I did not know what the age of the "Sudden" was. I did know, but I do not remember it now.

Upon cross-examination the witness testified as follows:

With respect to the cargo of the vessel, I knew one or two to whom some part of it belonged. I do not know to whom the coal belonged. There were half a dozen consignments of coal on board of the vessel belonging to different parties. I testified when my deposition was taken that the stores that were taken by the "Pitcairn" and the "Rube Richardson" would have been lost and ruined if they had not taken them. I told them to take them and whatever the salvage was, when I got to Nome I would pay. I do not wish to be understood on my redirect examination to vary or change that statement. When I got to Nome I made application to these people for this. They said they had the stuff and it belonged to them. These people who had the stuff stated that they had the property and would keep it, that it belonged to them—some such thing as that; I could not

(Testimony of John L. Panno.)

exactly tell the words; that is the substance of it. When I made application to Captain Tuttle of the Revenue Cutter "Bear" respecting my rights, Captain Tuttle said they said they found the ship abandoned and full of water, and he thought it was nothing more than right for them to have the proceeds of it. With respect to the 10 or 15 ons of coal that the "Corwin" took out to lighten the "Sudden" at the time she started to tow her, I think it is ours, because we put some coal in the fore peak to use when we first got there, and use to get up, and use for the steam launch, and for all other purposes. The probabilities are it was our coal I presume they kept it when they got to Nome, the same as the rest. I never saw it again. These 10 or 15 tons they took out of the fore peak and was part of our coal that had been set aside separately so as to be gotten at. I do not remember how much there was altogeher, but I remember we put a lot forward. I know where a part of the coal, belonging to the Nome Beach Company was stored aboard the ship. I do not know where the whole of it was. The 50 tons that they told me was lost was in bulk, it was in the lower hold aft, down near the skin of the ship, clear down, nothing under it. I do not know where the rest of it was, except this small part that was set apart to use on the "Dorohy."

Upon redirect examination the witness testified as follows: It was five or six or seven days after our arrival in Nome that I saw Captain Tuttle of the "Bear" about this matter. It was after the sale. It was three or four days after the sale that I talked with Captain

(Testimony of John L. Panno.)

Tuttle. He had not given me any advice about it before.

Upon recross-examination the witness testified as follows:

Mr. FRANK.—Captain, I will call your attention to this testimony, given by you in this deposition of yours:

"Q. You say that Captain Tuttle of the 'Bear' gave it all to the "Corwin"? A. Yes, sir. Q. What do you mean by that? A. I mean, there was no Court there, and Captain Tuttle was the Court. Q. In what way did Captain Tuttle give it to the 'Corwin'? A. They called a meeting and decided that what Captain Tuttle said was law. Q. Did you have any conversation with Captain Tuttle? A. Not at that present time; I did afterwards. Q. Did you have any personal conversation with Captain Tuttle about the goods being turned over or the goods not being turned over? A. Yes, sir, I did. I asked him why he gave it to the 'Corwin.' Q. Gave what to them? A. Gave it all to them; and he said that as long as the ship was going down and they saved her, that they ought to have it all." Is that the fact?

Mr. VAN NESS.—If your Honor please, I understand that he has testimony to that precise state of facts. The only thing he says now is that that conversation was after the sale.

The COURT.—Yes, he has testified to that, Mr. Frank, I do not think you ought to go over his deposition and

(Testimony of John L. Panno.)

read it to the witness, where it has aready been read, and have him affirm it.

Mr. FRANK.—Ordinarily I would not do it; but it is simply for the purpose of making the thing clear on the record with reference to the manner of the present examination; that is all.

Q. Did you have any conversation with the Corwin people before the sale with reference to Captain Tuttle's decision in the matetr? A. No, I did not.

Q. Not before the sale?

A. Not before the sale—Oh, well, before the sale? Yes, I did, too, come to think of it. I saw the president of the Company, Mr. Huestis, and he said they had given it all to them. He said it belonged to them and they were going to keep it.

Q. Whom did he say had given it all to them?

A. Well, I understood him Captain Tuttle.

(The witness, continuing, testified as follows:) I told him I thought they had not a right to it all, that they ought to land it. They said they thought they had; it was given to them, and they should keep it. And subsequently I asked Captain Tuttle if he had given it to them, and he gave me that reply.

The WITNESS (To the Court.)—Your Honor, this deposition has been taken a year or two, and there is lots of it that has slipped my mind, that I cannot go through just the same as though it was yesterday or six months ago. I guess it is nearly two years ago.

(The witness, continuing, testified as follows:) At the

(Testimony of John L. Panno.)

time this deposition was taken my recollection was fresher than it is now.

Upon further redirect examination the witness testified as follows:

I testified that I said to Mr. Huestis that I thought it ought to be landed and sold and the proceeds given to some one there, and, when a Court came, give them their salaries. I considered if it had been my cargo I would want it ashore as soon as it could be gotten ashore. It had been lying in the water in the lower hold, in salt water four or five days; in between-decks not so long; and it don't take salt water a long time to spoil a cargo. It was my opinion as an experienced mariner that it was to the best interests of all concerned, that that cargo should be taken ashore. I had no doubt on that point. They could sell it as they had a mind to, but I said it ought to be taken ashore. It was not my opinion that it would be sold for a better price if sold on shore than if sold on board the ship. I thought if A. B and C had cargo there it would be better to sell it aboard ship. They could see the cargo better aboard ship. The owners of the cargo could know in what condition it was, and the owners of the cargo could buy in on board the ship as well as they could buy it on shore; that is what I mean.

Upon further recross-examination the witness testified as follows: I took into consideration the situation of the vessel and the likelihood of storms at that time and the likelihood of the vessel going ashore and storms coming up at that time. In my opinion there was dan-

(Testimony of John L. Panno.)

ger of that sort at that time. There was a ship went ashore just before I got there. I thought if they could have got it ashore without having to wait too long, or to take any chances of the ship herself going ashore, that that might be a better way of doing it. It was my judgment that the longer that cargo remained on board the more likely it was to depreciate in value; and I considered that every day the cargo was left on board would add to its depreciation; that the proper thing to do to preserve that value and to save that ship was to get it out of the ship as soon as possible. Every day it was left there it meant serious loss. The "Corwin" people would not allow me to take it out; they would not allow me to touch it.

Counsel for defendant here introduced in evidence the deposition of JAMES W. SIMMIE, taken on behalf of the plaintiff, which deposition was in the words and figures following, to wit:

I am a master mariner, 54 years of age; I expect to leave to-morrow morning upon a voyage to Puget Sound, and from thence to Calleo. I was on board of the Barkentine "Catherine Sudden" on her last voyage from San Francisco toward Nome, Alaska. Upon her voyage she ran into a cake of ice and filled. She did not sink entirely, the bow went down so that the vessel was to the dead lights on the midship deckhouse. That would be in the neighborhood of 6 or 7 feet from the deck. She was entirely submerged except her deckhouse. There were two other vessels about at the time, the Brig "Pit-

(Deposition of James W. Simmie.)

cairn" and a schooner, the "Rube Richardson." There were probably seven or eight other vessels in the ice in the neighborhood at that time. The one that was closest to us besides those other two was the "Fish Brothers" of Seattle. They were all bound in the same direction. After the vessel sunk, that is, after she struck the ice, there were efforts made to save the vessel, to see if they could pump her out and keep her afloat. After using the pumps for three or four hours they finally concluded they could not stop it. First when the vessel struck the ice the second officer and one or two of the men went down below into the fore-peak to try and stop the leak with oakum, pillows, mattresses, anything they could get hold of, but they found they could not do it; the water was rushing in so fast that they could not get anything in to stop the water. I heard the Captain call to the captain of the brig "Pitcairn" to stand by him; that he was sinking, and the "Pitcairn" went alongside of the ice and made fast. The "Pitcairn" simply stayed by in case we should sink, so as to take the crew off. After she was submerged no other assistance was rendered to her by any other vessel until the "Corwin" came along. She came the next day, and the captain went to see him and see what arrangements he could make with him. The Captain and a part owner of the Nome Beach Company went aboard of the "Corwin" to see what arrangements they could make. Afterwards they reported to the first officer of the "Sudden." The captain of the "Corwin" came aboard, and looked around and he said that he would tow the steam launch

(Deposition of James W. Simmie.)

off the vessel's deck, pull her off for what he could pick up. What he meant by that I don't know; I suppose it was what was lying on the deck. They finally came alongside with the "Corwin" and made a line fast to the steam launch and pulled her clear of the vessel's upper deck, the top of this house, for that was built on midships. After that they took her alongside of the "Pitcairn," and I went aboard of the launch and took charge of her. Then I left the "Sudden." One lighter that came off when the vessel heeled over to starboard and carried away her mast, slid off the deck. The launch and the lighter were taken alongside of the "Pitcairn" and made fast there. After two days, I think it was, the engineer got the boiler in condition, and the smoke-stack on, and the boiler filled with water, and finally got steam on the boat. This was on the "Dorothy," the launch. We had then separated from the "Corwin" and the "Sudden" probably a distance of a couple of miles, I could not tell just exactly how far. After I got steam on the boat I tried to get around to where she was lying, but we did not succeed till the second day, and finally a passage opened up, and I went alongside then. By that time they had got the water pretty nearly all out of the "Sudden." The "Corwin" made fast to the "Sudden" just as soon as the launch was taken off her. I did not take the scow; the scow was still left alongside of the "Pitcairn"; and Captain Panno informed me that the "Corwin" would come over in the afternoon, or in the evening somewhere about 7 o'clock, and was going to tow the outfit to Nome. He came there somewhere be-

(Deposition of James W. Simmie.)

tween 7 and 8 o'clock. I could not be certain just as to the time, but he broke his way through the ice and took the lighter in tow, and I followed behind him; then we went back to the "Sudden" and made fast there for that night and part of the next day. By "the outfit" I mean the "Sudden," the lighter, the "Dorothy" and two surf-boats. They were towed by the "Corwin." The "Corwin's" crew, assisted by the "Sudden's" crew, took the two surf-boats back on the ship again—pulled them up on the ice and then pulled them aboard of the "Sudden" onto her upper deck, and the lighter was towed astern of the "Sudden," and I was fast astern of the lighter with the launch. They started for Nome. Before we started the "Corwin" had got all the water out of the "Sudden." When she got to Nome she was a wreck. I was informed by the captain of the "Sudden" that he had made arrangements with the Corwin Trading Company to lighter their cargo, that is, use the Nome Beach Company's lighter, and towing their lighter and a small lighter belonging to the Corwin Company loaded with freight from the steamer to the beach. I did that. We were engaged in that service one day and one night. The reasonable value of the use of our launch and lighters at that time at Nome was $400 per day, and the launch was $25 a line for every time a line was put on the lighter, or $25 a tow is what it amounted to. This $400 a day included 10 working hours, from 6 in the morning to 6 at night. The value at night was just the same as in the day. We worked the whole night from 6 o'clock in the evening till 6 o'clock the next morning.

(Deposition of James W. Simmie.)

I could not say how many times I went with the launch, for I did not keep any account of their work. There would be at least one every hour. I was engaged in that service myself for the rest of the season. During that time I was running the steamer.

Upon cross-examination witness testified as follows:

The date of our sailing from San Francisco on the "Sudden" was the 28th of April. I do not remember the date on which ice was first sighted. We passed through the end of the Unimak Pass in the evening and came out again, and went through the next morning, or the next day; we went through in daylight. We entered it in the evening and the tide carried us back out again, and the next morning we were still in the southern part of the entrance of the Pass, and we went through that forenoon, out into the open sea about noon of the same day. It could not have been more than two days after that that we sighted ice. I do not remember the hour of the day, or night, as the case may be, because I had nothing to do with the ship at all, and took no particular notice of that. We sighted ice for several days before we got into it, floating ice. At first it was simply pieces, and gradually got to be larger fields, until we got up into the main pack. It was 2 or 3 days after we sighted ice, before we reached a point where the ice was in considerable quantities on all sides of the vessel. The patches at that time were from half a mile to a mile in width, detached patches, or fields, whatever you call it. We were steering all around the compas. We had to follow the leads in through the ice. We were dodg-

(Deposition of James W. Simmie.)

ing the ice. I could not be positive about the direction generally the ice was moving. The ice is nearly always working; sometimes it works to the westward, sometimes to the eastward, and to the south, and to the north. I am not able to state the general direction in which it was moving at this time. This was my first season in the Behring Sea; I never had occasion to navigate a vessel in seas where one meets with floating ice. Since that time I have had no experience in that character of navigation in charge of a vessel. I went up there last year, leaving on the 21st of April. We met ice 60 miles north of the Unimak Pass, the first ice. It was reported by Lieutenant or Captain Jarvis that he never saw the ice so close down to the Pass as it was last year. I took passage on the "Sudden" merely as a passenger. I had not been in Nome previously. I went there to run the launch "Dorothy," having been employed by the Nome Beach Lighterage & Transportation Company. I was under a salary and continued to work for the Nome Beach Lighterage and Transportation Company during the whole of the season of 1900. I have not been in their service since. I went in their service only during that year. I had nothing to do with the construction or superintendance of the construction of the "Dorothy" and the lighterage plant generally; I merely went up there as a capable man to run that plant.

Q. I understand you to say that the "Catherine Sudden" was finally struck by the ice, which caused the injury to her from which she sank?

A. She struck the ice, I suppose it might be both, be-

(Deposition of James W. Simmie.)

cause the ice was apparently moving, closing in the gap.

Q. Had the ice closed in around her at any time so as to hold her in position up to the time she was struck by this blow that injured her and caused her to sink?

A. She was not in close contact with it; that is, surrounded by it; that is, she had room to move, when we had wind we could move around.

(The Witness Continuing:) I am familiar with the sea, and a competent sailor. The "Sudden" when she first sighted ice, could have returned to a port of safety, if it were considered dangerous to navigate her in the ice, but she could not have done so later on. I am not familiar with the construction of the "Catherine Sudden."

Q. You don't know whether she is a boat capable of sailing under those conditions with safety?

A. We always supposed she was.

Q. Who are "we"?

A. The people on the front. Oh, you mean sailing through the ice as a whaler?

Q. Yes. A. No, I don't think so.

Q. You don't think she was capable of doing it?

A. I could not say about the condition of the vessel for the ice business, because I never had anything to do with it.

Q. I understood you to say you did not think she was constructed for that character of work; did I understand you correctly?

A. No; I misunderstood what you said when I said "yes."

(Deposition of James W. Simmie.)

(The Witness Continuing:) I do not consider myself competent to state that she was just as fit to send on that voyage at that season of the year as the other vessels. At the time I saw her I thought she was fit to take a voyage in the Behring Sea at a time when floating ice was to be found there, because I did not know. Subsequent to the accident I ascertained the character of her structure. She was built just the same as any other ship would be, the construction of the ship—I don't know anything at all about that.

Q. That does not answer my question, Captain. I say, with your experience subsequently obtained as to the structure of the vessel, and with the knowledge that you now have of navigation in those seas, was she a properly constructed vessel to undertake a voyage in the Behring Sea, at a time when floating ice was to be expected?

A. I don't think so. If she was mine I don't think so. If I was building a vessel for the purpose of going through the ice, I should construct her differently as to sheathing.

Q. Then you don't think she was a properly constructed vessel for a voyage of that character under those conditions?

A. Not to go through the ice.

(The Witness Continuing:) The port bow was knocked in, the lower portion of it, the lower plank in the port bow, port, by striking the ice. It was just close to the water line, a little above the water line, that is, the end was down. You understand they run on an angle, and

(Deposition of James W. Simmie.)

the lower end must have been lowest. The water could not get in if it was above, because there was no sea on. It was close to the water anyway. I did not go below to examine as to her condition after she struck. As to her cargo, I simply know that it was merchandise and coal. I understood there was 450 tons of coal on board. I do not know the quantity of lumber she was carrying, nor what the principal portion of her cargo consisted of.

Q. During the time that you were in the ice, and after this accident happened, was her cargo shifted to any extent? A. Not that I know of.

Q. Was it shifted from the forward end of the vessel to the after portion, for the purpose of lightering her forward? A. No, sir.

Q. Are you confident of that?

A. I am satisfied it was not, not while I was there.

(The Witness Continuing:) Cargo was removed from the "Sudden" that is, the two vessels that were lying there they removed something, the "Pitcairn" and the "Rube Richardson." I do not know what portion and character of the cargo was removed from the "Sudden" to the "Pitcairn" and the "Rube Richardson," except barrels; I saw them moving barrels, kegs—butter kegs I judge they were, I did not pay much attention. They helped themselves to the provisions from the "Sudden," but what they took I could not be positive about, because I was not much interested in it. I can give no idea as to the quantity of stuff that was moved. It was not very much. I could not roughly approximate it. I cannot say as to whether this was done with the knowl-

(Deposition of James W. Simmie.)

edge of Captain Panno, the captain of the "Sudden," and I could not say whether any protest was made by Captain Panno against the removal of this merchandise. I was not around with the captain all the time; I was looking after the boat I intended to run. There was no protest as far as I know. I could not say whether any portion of the cargo of the "Catherine Sudden" was removed from her to the "Corwin" before we started for Nome. I could not say whether there was any coal taken from her and carried to the "Corwin," I presume that there was, because I presume they filled their coal bunkers; she was alongside for that purpose.

Q. How do you know she was alongside for that purpose? A. Well, anybody would know that.

Q. Well, I don't know it.

A. They were not going to let coal worth $100 a ton lay there without helping themselves.

Q. Was the removal of the coal from the "Sudden" to the "Corwin" made while they were lying in the ice?

A. Yes, sir.

(The witness continuing:) I could not say what quantity was taken off her; I didn't see coal being moved. I am pretty positive because I know they needed coal. Any steam vessel needs coal up there, I am pretty sure the "Corwin" did. The vessels had been so long in the ice, it was certain they needed it. Some of them had to return to Dutch Harbor for coal, some of the other steamers. I know the coal was worth $100 a ton because it was worth that when I got to Nome. I do not know exactly what time we started the day before in

(Deposition of James W. Simmie.)

tow of the "Corwin"; it was some time in the early part of the evening, but we arrived at 10 o'clock at night; it must have been in the neighborhood of 24 hours, that is, from the point where the vessel was lying when they started. The vessel had probably drifted considerably at that time. The "Sudden" anchored about 2 miles from the beach. That is the usual anchorage—from three-quarters of a mile to two miles or two miles and a half. The weather was fine, the water pretty smooth. I think we arrived upon the 10th of June, but I could not be positive, and I remained there through the entire season. The fine weather did not continue very long, probably a week. We had various storms, sometimes two or three days fine weather, sometimes two or three days bad weather. The "Sudden" rode through those storms at her anchorage. I think she was driven ashore somewhere about the 10th or 13th of September, I don't know just when. Just about the time of the equinoctional troubles. Up to that time she had lain at her anchorage, where she was placed when we arrived; she did not shift her anchor at all. We arrived there at 10 o'clock at night. The launch and the lighter were afloat in tow of the "Corwin," and the two surf-boats were on board the "Sudden." These surf-boats were to be used for the purpose of carrying freight ashore when too rough to take on lighters. I went up simply for the purpose of running the "Dorothy." The lighters were to be used to carry the freight ashore. All my duty was to tow lighters back and forth. I had nothing to do with them as to their character, or any-

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thing else, I was simply to run the launch and tow the freight that was on the lighters, and tow the lighters back. The next day after we arrived I got my orders to discharge freight from the "Corwin." Captain Panno gave me my instructions in regard to the use of the lighterage plant. He told me that he had made arrangements to tow their lighters—their freight, ashore, that is, the lighters of the "Corwin." The "Corwin's cargo consisted of merchandise. I do not know whether or not after the "Corwin" arrived at Nome any part of the "Sudden's" cargo was taken on board the "Corwin." I think I employed the launch "Dorothy" and these lighters in discharging the "Corwin's" cargo the day after we arrived. It took us one day and one night, or whatever portion of the day it was that we commenced. I should think the "Corwin" was fully loaded—she was deep enough. She was a different ship altogether from the "Catherine Sudden." There is no comparison between her carrying capacity and that of the "Sudden." One is a sharp steamer and the other is a vessel built for freight. I cannot tell how much more relatively the "Sudden" would carry than the "Corwin," because I don't know what the "Corwin" would carry. I do not know the tonnage of the "Corwin." Assuming that we worked with the same degree of speed in getting the freight out of the "Sudden" that we did in getting it out of the "Corwin," it would have taken a week to get it out. They could not take it out in a week working 10 hours a day, unless they had very fine weather. Part of the time we did have fine weather during that

(Deposition of James W. Simmie.)

week. In fine weather there might be swell enough so that we could not do anything.

Q. Were the conditions such that working 10 hours a day you could have lightered the cargo of the "Sudden" to the shore?

A. So far as I was concerned I might do it, but I did not have charge of the "Sudden."

Q. I ask you if it could save been done, assuming the captain and the crew and others interested in the matter had wanted to lighter the cargo of the "Sudden" to shore, could they have done it in a week working ten hours a day?

A. I presume they could if they had sufficient appliances.

(The witness continuing:) Sufficient appliances would consist of sufficient lighters. We could not do it with the lighterage plant we had. I do not know how long it would have taken to lighter the cargo of the "Sudden" to shore. The "Sudden" carried lumber for houses, knock-down houses. I don't know what other lumber she had, only I saw on the wharf pieces of portable houses. We had the "Dorothy" and one lighter there to use when we got up there.

Q. What use did you put them to, after you got through lightering the cargo of the "Corwin"?

A. I could not be certain when, but I know the lighter was rented to the Alaska Commercial Company, at a rental of $400 a day.

Q. Rented by whom?

(Deposition of James W. Simmie.)

A. The Alaska Packing Company.

Q. Rented by whom?

A. By the Nome Beach Lighterage and Transportation Company—whoever was running it.

Q. How do you know the lighterage plant was rented by the Nome Beach Lighterage and Transportation Company to the Alaska Commercial Company?

A. I know the superintendent told me so.

Q. The superintendent of the Alaska Commercial Company? A. No, sir.

Q. The superintendent of the Nome Beach Company?

A. Yes, sir.

Q. What was his name? A. Captain Morine.

(The witness continuing:) He didn't rent the launch to the company, he rented the lighter, he rented it for $400 a day. He told me that shortly after I got through using the lighter in discharging the "Corwin." After we got through discharging the "Corwin" the "Dorothy" was used for general towing business. I used her, and was running her under the instructions of the Pacific Steam Whaling Company, who were acting for the Nome Beach Company. That is under the instructions of Captain Humphrey. The launch was paid $25 for every tow she made, and she was in constant use during the season, operated by me. Sometimes she would make twenty or more tows, and sometimes she did not make any, according as the work came. The proceeds of that tonnage was paid to the Pacific Steam Whaling Company, for the Nome Beach Company.

Q. Can you explain to me how it was that the launch

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and the lighter became separted in their employment? I understand you to say that the launch was employed by Captain Humphrey for the benefit of the Nome Beach Company, and that the lighter was rented to the Alaska Commercial Company; do you know how it was they came to separate the lighter and the launch?

A. Because the Alaska Commercial Company wanted her.

Q. Do you know whether any of the cargo of the "Sudden" was lightered by the launch or the lighter during the time that they were there during that season?

A. I don't recollect of but one lighter load that was taken out, and that was along at the very last.

(The witnss continuing:) That was a lighter load of dunnage wood that had been down at the bottom of the ship. I do not know why the launch and the lighter were not used to lighter the cargo of the "Sudden" to shore. I never talked with Captain Panno nor with Captain Morine about that, nor with Captain Humphrey. All I know is that I received instructions to unload the "Corwin," and was given no instructions to use her to unload the "Sudden." I cannot possibly say how much in weight, without regard to measurement, but how many tons in weight, that lighter would carry in one load. I should approximate it somewhere between twenty and twenty-five tons. In lightering the freight from the "Corwin" to the shore it was delivered in front of the "Corwin" Company's property—the Corwin Trad-

(Deposition of James W. Simmie.)

ing Company's lot; that was on the open beach. The usual custom up there was to deliver the goods from the vessels right on the beach. I suppose they were taken away by whoever owned them. The "Corwin" and the "Sudden" were not the earliest arrivals there that season because there were a number of steamers in when we got there, but we were among the early arrivals. The rental value of the lighter up there for lighterage purposes was $400 per day; that is what they rented her for, and the launch was $25 a tow. $25 each way, whenever a line was put on her, that is, if we went out empty we got $25; a round trip tow was $50.

Upon redirect examination, the witness testified, as follows:

With reference to the condition of the vessel for sailing up there, she was of just the same description as all the other vessels that went up that season. I do not know what became of the cargo that was taken off by the "Pitcairn" and the "Rube Richardson." I could not say why the Corwin people helped themselves to coal, only that they wanted it, I suppose. Captain Panno simply told me he had made arrangements while in the ice, or made an ,agreement with them, to tow their freight ashore, or lighter it, and let them have the use of our lighter, and the use of the boat. This was as part of the consideration for towing the outfit to Nome beach, part of the consideration for the salvage service.

Q. With respect to taking the "Sudden's" cargo out,

(Deposition of James W. Simmie.)

is your testimony confined to what you could have done with the launch and the "Dorothy," or did you intend to include the necessary operations of those who would have to get the cargo out on deck and load them on to your lighter?

A. I was figuring from a statement of what other vessels did.

Q. Other vessels in the same condition with respect to being disabled—having been full of water?

A. No, sir.

Q. In perfect condition, with proper appliances?

A. In perfect condition.

Q. Would, or would not, the condition of the "Sudden" at that time have made a great difference in that respect?

A. Why, certainly, it made all the difference in the world.

Q. And you would not be able to state whether or not that cargo could have been taken out within any reasonable time, or otherwise?

A. No, sir, I could not give any statement as to that.

Upon recross-examination the witness testified, as follows:

The condition of the "Sudden" at that time that would have made it more difficult to take a cargo from her than from any other vessel was that there were no masts or gear to get the freight out; the masts were gone. If they had rigged a mast upon her after she got to Nome, she would have been just like any other

(Deposition of James W. Simmie.)

vessel so far as discharging was concerned, if they had our derricks up. A mast could not have been rigged at that time unless they had taken the old masts out first, the pieces of them.

Q. That could have been done, could it not?

A. Yes, sir.

Q. If you are sufficiently informed on that subject, how long would it have taken to take the old masts out and have rigged the necessary appliances?

A. I could not say, because in all probability they would have had to send to Seattle for their spars.

Q. Do you know whether they would or not?

A. I am pretty sure they would, because they did not have any there that I know of.

Q. Could they have suggested any other method or hoisting gear? A. They might have.

Q. Could you say whether they could or not?

A. I could not say.

Q. You say Captain Panno told you he had agreed as part of the consideration for the "Corwin" towing the "Sudden" and the launch and lighters to Nome, he would discharge the "Corwin" with this launch and lighter?

A. That was the understanding I had from him.

Q. Did he say anything to you about having agreed to pay $2500 for that service?

A. Captain Panno did not, but Mr. Benns mentioned the fact.

(The witness continuing:) Mr. Benns told me that when

(Deposition of James W. Simmie.)

we were lying in the ice. Captain Panno told me in Nome that the consideration for the use of the lighter for removing the cargo of the "Corwin" was the towing of the "Sudden" and the lighterage plant to Nome, the day after we got there. He did not say anything about the real consideration being an agreement to pay $2500. He never told me anything about any consideration at all. He told me in Nome that he had agreed to tow their freight ashore with the use of our lighter. I asked Captain Panno the question if he had made any agreement with them about towing the plant ashore, and he said he had, and told me they could have the use of the lighter and the boat. I understood the reason was in part consideration of the towing up.

Q. How did you understand that.

A. Anybody would understand that in the business.

(The witness continuing:) There was no change in the condition of the "Sudden" from the time she arrived at Nome down to the time she was driven ashore in September.

Upon redirect examination the witness testified as follows:

I supposed that the agreement was made with the Corwin people about towing the outfit up for a certain amount, but I did not hear anything about this lightering ashore till we got to Nome beach, and one of the passengers came on board of the "Dorothy" and claimed the right to hold her as we had not fulfilled our contract; I told him there were no strings on this boat, that their agreement was—she was towed off, and there was

(Deposition of James W. Simmie.)

nothing more to do with her; and he informed me that the Captain had made an agreement besides what they were to receive for towing her up they were to lighter the ship. I know nothing of my own knowledge about the exact agreement; all I know about the agreement is Mr. Benns asked me about the price of $2,500, what I though about it; I thought it was a very high price.

Q. And you don't know whether that $2,500 referred only to the "Dorothy" and the launch, or whether it was to include the "Sudden" also?

A. I did not know anything about the "Sudden" at that time.

Q. Or the cargo, either? A. No, sir.

Upon recross-examination the witness testified as follows:

From the time the "Corwin" started with the "Sudden" launch and lighter in tow, we had pretty easy sailing. We had quite a breeze once in a while, when we got through the ice, but not enough to cause any difficulty in navigation.

JOHN L. PANNO, a witness recalled on behalf of defendant, testified as follows:

Two days after we arrived at Nome the "Dorothy" and the lighter which had been taken off the "Sudden" and towed into Nome were put to work lightering the "Corwin's" cargo. The "Dorothy" got the coal with which to do the lighterage of the "Corwin" cargo from the "Catherine Sudden." She got some of it after she got into Nome, and some of it was aboard of her when

(Testimony of John L. Panno.)

she got up there. I do not know what the coal-carrying capacity of that launch was. I cannot give you an approximation of her carrying capacity. I do not know how often she had to coal at Nome Beach. I presume not more than once during a day and a half or a day and a night. It is my recollection that she had a coal carrying capacity sufficient to work her for a day and a half. I do not know how many tons. When we met with the accident in the ice the "Dorothy" was on the upper deck, on the house that was built there. She was not lashed when the "Corwin" came alongside; we had her clear, trying to get her off ourselves. She was all clear when the "Corwin" came alongside. That is why I cut away the rigging, so that if the ship went down she would not take the launch with her. The lighter was off. When the ship rolled down to port the scow lighter rolled over so we could get her off ourselves. There were two small lighters besides that; two small surf boats. There was one still on deck, and there was one in the water when the "Corwin" came alongside. The scow and one of the surf-boats was in the water, and the lighter and the other surf-boat was on the deck of the "Sudden"; and the lighter and the other surf-boat were so detached that if the "Sudden" went down they would float. Everything had been arranged so that they would be saved if the "Sudden" went down. We wanted them for ourselves. When the "Corwin" came alongside I asked him what he would haul the "Dorothy" off the deck

(Testimony of John L. Panno.)

for. The water was up that much all round her (indicating). He said to me "I will pull that lighter off for what I can pick up on the decks"—I mean the launch; and he pulled her off. There was some spare lumber and some spare stuff that had not floated off, which he meant by "what he could get on the decks." I said "all right" to that. When we started to get on top of the ice she went down forward, and the little surf-boat nearly came off herself, with a little help. Only the scow and the "Dorothy" were towed in. We put the boats on deck again, on the deck of the "Sudden." It was the launch and the scow that were towed in. I do not remember about taking coal from the "Sudden" and putting it on the launch while we were in the ice at that place where the accident happened, but I know there was coal put in there, and also on the scow in case we had to tow her; that is, in case the launch herself would have had to tow her. My intention was when the "Pitcairn" came down, to tow the scow with the launch into Nome. In other words, when the "Pitcairn" sailed through the lead of ice into Nome I would have followed behind with the launch under steam towing the scow, and still have a line if the "Pitcairn" went faster than we did, to have a line from her to help us. That was my intention when the vessel filled full with water. I remained in the ice after the "Corwin" got there between five and six days. There was an open lead ahead of me so that I could see clear water ahead of me all the time. This

(Testimony of John L. Panno.)

lead extended as far as I could see from off the deck. The next day the lead shut in. The ice had not opened out again where the "Corwin" was and the "Catharine Sudden" was. That steamer was built so she could come down through. She came down with the "Pitcairn" four or five miles. She lay with the "Pitcairn" southwardly and westwardly. After I made a contract to tow the scow and the lighter in she came down with the "Pitcairn" and took the "Dorothy" and the crew that was in the scow—the crew was in the scow, living there—and took them out and towed them up to where the "Catharine Sudden" was. And in the meantime it broke up a little ahead and he started and got through the next day. I did not make the bargain with the captain of the "Corwin" to pay $2,500 to take them into Nome until just before he left the "Catharine Sudden" to come down after the steam launch and the scow. My bargain with them was made several days after the launch had been floated in the water where the wreck was and just before we started. We did not suppose he would ever get the "Catharine Sudden" up, and if he did not have all the appliances in the world he never would; he would not have got the water out of her. He had about fifty men and all the appliances. Those scows that the "Dorothy" was sent up there to haul were capable of holding 25 or 30 tons according to the weather there on the beach.

Upon cross-examination the witness testified as follows: I did not pay any attention to the "Dorothy"

(Testimony of John L. Panno.)

after I got to Nome with respect to the discharge of the "Corwin." I told Captain Simmie what I had agreed upon, and he done all that work. I did not go near him. I think I can swear that the coal from the "Catharine Sudden" was taken off the poop where it was laid aft. They did not get it out of the hold. I do not know how much coal she burns a day. She is a small launch. She has as big a steam capacity as she ought to have according to her size. I do not know anything about what it is.

Upon redirect examination the witness testified as follows: It would be impossible for the launch "Dorothy" to have burned as much as 25 tons of coal a day. I do not think she would quite come up to five tons; I do not know. Of course, I was not in that business. The coal that we had in the lighter in our launch we got that ourselves before the "Corwin" came alongside. I only saw a part of it on the "Dorothy" strewn around. We took all we could. I cannot tell whether we got out as much as five or ten tons; I never saw it. Whatever quantity we got out we got with the idea that if the "Sudden" went down and we couldn't save her, we could steam into Nome with the launch and pull the scow in behind her.

(Here defendant rested.)

JAMES W. SIMMIE, a witness called on behalf of the plaintiff in rebuttal, being sworn, testified as follows:

I was the master of the "Dorothy" during the time here in controversy, operating her all the time she was up at Nome. I remember putting coal upon her at the time of the sinking of the "Sudden." We could not put more than two to two and one-half tons in the bunkers; they would not carry more than that. During the time we were discharging the "Corwin" she would not average between five and six sacks a day steady, running 80 to 100 pounds per hour. She averaged the whole season between four and a half and five sacks a day. Of course, there were days we lay still. During the time we were discharging the "Corwin" we had to lay sometimes for half an hour or an hour. She had not burned over a ton of coal in that time. I do not recollect, though I would not be positive about it, that we went to the "Sudden" at all to get any coal off her during the time we were discharging the "Corwin." I think the "Corwin" people told me if I wanted coal I could get what coal I wanted, but whether I got any during that time I was working for her, I could not say. I recollect getting coal from the "Sudden" once or twice, but whether it was while I was working for the "Corwin" I could not be positive. I do not know whether that was before or after the sale. I recollect getting ten sacks of coal from her. I think it was before the sale, though.

(Testimony of James W. Simmie.)

Upon cross-examination the witness testified as follows:

We had coal, but I do not recollect where it came from. I know it either came from the launch, or the lighter, or from the "Sudden." I believe there was some coal on the lighter as well as in the launch when we got into Nome. When the vessel got in distress I requested Captain Panno to put some coal aboard of the boat and also on the lighter, in case we should require it. I expected to require it to get ourselves to the place of destination, if we possibly could. That is, from the place of the wreck to Nome.

Upon redirect examination the witness testified as follows:

That was our only means of preservation, and we were taking those chances. If we did not have any other means of preservation, we were going to preserve ourselves in that way.

H. A. MASON, called for plaintiff in rebuttal, testified:

"My occupation is seafaring. I have been in the Arctic Ocean trade for the last 13 years on the steamer "Jeanie." She was a tender for the whalers. I took her to Herschel Island. Herschel Island is at the eastern end of the mouth of the McKenzie River, in northwest Canada, 600 miles from Behring Sea. You pass through Behring Strait, and then go northward and eastward 600 miles around in the Arctic Ocean to reach

(Testimony of H. A. Mason.)

Herschel Island. It is as far east, or as far north, as any of the whalers have winded yet. I have not made that trip every year. I have made six trips to Herschel Island during that time, but I have been in the Arctic Ocean every year for 13 years. We encounter heavy ice off Point Barrow and off Return Reef. Our aim is to leave here on the 25th of May, or not later than the 1st of June. That would bring us to Behring Sea on the 15th of June, surely. If we left here on the 28th of May we would get there about the 16th of June. The ice in the Arctic is much harder and thicker than that in the Behring Sea. All of the ice has to be floating to get through it at all. If it is compact it is impossible to get through the Arctic ice. The size of the floes is a good deal larger north. I have also been in the Nome trade every year since that trade was opened. My earliest trip was on the 23d of May; that is, I arrived at Nome on the 23d of May. The next year was on the 24th of May. This year was on the 2d of July; we got caught in the snow. I know all the vessels that go into Nome up to date, those that come both early and late. There are other vessels that have got in as early as, or nearly as early as I did.

Q. With reference to the practice of sheathing vessels for travel in the Behring Sea, from her to Nome, are they generally sheathed, or otherwise?

Mr. VAN NESS.—Objected to as irrelevant, immaterial and incompetent, what is generally done.

The COURT.—The objection is overruled.

(Testimony of H. A. Mason.)

Mr. VAN NESS.—We note an exception.

A. No, sir; they are not.

(The witness, continuing, testified): Sheating does not strengthen a vessel one particle. It is to keep the vessel from being chafed up, and to keep from having engraven pieces sunk on her side. So far as the strength is concerned, there is none there. Naturally, going through the ice, the ice is hard; it will chafe a vessel's side out; it will take splinters out; and when you get back again you will have to go to the expense of having it put back. You can have this sheathing taken off or put on as readily as you can put a board on there. Our sheathing on the "Jeanie" is an inch on the bottom, and it is a inch and a quarter, or an inch and a half, at the top. All that is in that inch and a half is 4-inch spikes, that do not go through the planking, and it is driven on by hand. The sheathing is practically in the same situation as if it had been glued on the outside, and it adds nothing to the fastening or strength of the vessel, but simply takes the chafing, so that it can be removed and a new one put on. My first voyage to the Arctic we had not a particle of sheathing on, not even as much as a seam plate on, not a particle of sheathing, not at all. We went then to Herschel Island and to Peley Island; that is 100 miles further. We got through very large, heavy ice.

Q. With respect to a vessel that is conceded to be seaworthy in open waters, would you regard her just as seaworthy in the ice that is expected to be met in

(Testimony of H. A. Mason.)

Behring Sea, in that season of the year, whether she had sheathing, or did not have sheathing?

Mr. VAN NESS.—I object to the question on the ground that it is immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled.

Mr. VAN NESS.—We note an exception.

A. I think she would be just as safe without sheathing.

(Continuing the witness testified): In 1900 I was at Nome on the 23d day of May, and left to come out on the 3d day of June. The day I sailed from Nome, I steered a straight course for 100 miles, and did not see a cake of ice. I came in contact, the next day, with the ice about 30 miles. That is all the ice I met on the voyage out. I was four days in coming out to Dutch Harbor; not quite four days from Nome to Dutch Harbor. The ice ordinarily to be expected at that season of the year in Behring Sea is all broken up. A cake of ice as large as this room to a vessel going through the water would be dangerous, if she struck it. I could get through it with the vessel I am in.

Upon cross-examination the witness testified:

During the last eight or nine or ten years that I have been engaged in the business, I have been in steamers all the time. I have been in the one I am in about fourteen years. I had two ships before being commander of the steamer "Jeanie," sailing into Liverpool, New York and London from here. I had never been

(Testimony of H. A. Mason.)

master of a sailing ship running into the Behring Sea or the Arctic Sea. My only experience as a mariner in those seas has been in command of a steamer. A steamer is more easily handled in these seas where there is ice than a sailing vessel. A steamer is not any safer than a sailing vessel in the ice. You can dodge the ice. I do not think you take more chances with a steamer than with a sailing vessel. I would not say that, taking the same care with a steamer that you would with a sailing vessel, a steamer is safer in the ice and less liable to injury than a sailing vessel. You cannot back a steamer in the ice, but you can avoid the ice with greater facility than you can with a sailing vessel. The steamer "Jeanie" was not built for the Artic business; she was built for the fruit business East. She was floated in New York and brought out here. They did not know what trade she would be in. Before I took command of her she was in the general coasting business. I was running her for the Pacific Steam Whaling Company. That was the company of which Captain Humphreys was the agent at Nome at that time. I have known Captain Humphreys 30 years. Captain Humphreys took command of the "Jeanie" first after she was purchased by the Pacific Steam Whaling Company. There were no changes made in her up to 1898. She was then rebuilt over again, refastened in every way, refastened and restrengthened, because it was necessary, because the trade she had been in warranted it to be necessary. She had new boilers, new sister

(Testimony of H. A. Mason.)

keelsons in her, her between decks strengthened, that is, stringers along the between decks. She had been running into the Behring Sea or Arctic Ocean prior to 1898. The "Jeanie" has been once a year in the Behring Sea since 1887. The ice in the Arctic Ocean is more solid than in the Behring Sea. Its movement depends upon the current and winds. It does not work one year alike. I never heard of a sailing vessel going into the Arctic Ocean on a business proposition. Steamers go there because they would be the quickest. A sailing vessel would be pretty apt, if she got up there, to be froze up, I have been froze up there myself. I think I am familiar with the Nome trade. I don't pretend to know it all. I am familiar with the business of sailing vessels or carrying vessels up to Nome and back. I have been doing that ever since Nome beach became a place of rendezvous. I have said that vessels would go up into the Behring Sea just as safely without the sheathing. I know of no sailing vessels that go up there sheathed, only whalers. If the vessel was loaded in San Francisco, and she had to go from here to the Behring Sea, and had to cross the Pacific Ocean, she is just as safe in the Behring Sea as he would be in the Pacific Ocean, as the weather is more boisterous in the Pacific Ocean than in the Behring Sea. There are no dangers to sailing vessels to be apprehended from ice in the Behring Sea in the month of June, when ice is floating in that sea?

(Testimony of H. A. Mason.)

Q. Is there any danger at all to be apprehended to a sailing vessel being put through the Behring Sea at any time when ice is floating in that sea?

A. There is danger to all vessels, not only sailing vessels, but danger to a steamer.

The danger is identically the same in the case of a steamer and a sailing vessel. A weakly constructed vessel is not as safe in the Behring Sea when ice is floating there as a strongly constructed vessel. As long as a vessel is built staunch and strong she is just as able to navigate the Behring Sea as the Pacific Ocean. In other words, if the vessel is seaworthy, she is seaworthy for that purpose, in my estimation. If she is seaworthy she is seaworthy; that is, if she is built of sufficent strength and her parts are all in good order and of the requisite strength, she is all right; if she is not, she is not all right. Whether a vessel is or is not seaworthy depends upon the age, construction and strength of the vessel; it depends upon the build of her, I think. The age of a vessel has something to do with its ability to stand hard weather and bad weather and bad seas, ice and all that sort of thing. Some older vessels are better than new ones. Assuming two vessels both built at the same time by the same men in the same way, strength and capacity, or rather, built at different times by the same man on the same model, of equal strength at the time they are built, the older vessel is less likely to stand hard usage than the young one. There is a point of time in the life of every vessel when it begins to be more

(Testimony of H. A. Mason.)

or less unable to stand rough treatment in the sea. I have seen the "Catherine Sudden" and know of her, but I was never aboard of her in my life. I don't remember whether she was a bark or a barkentine. The average life of a vessel of the character of the "Catherine Sudden" would be about 35 years some run longer; some don't run a year. I have stated the average life as nearly as I could 35 years.

Upon redirect examination the witness testified as follows: The first year I was in the steamer "Jeanie" that she was sheathed I knocked a hole in her and came down with eight feet of water. I was going through the water at that time at four knots. She was in as good condition as they ever could put her in. When I said something about sailing vessels not going into the Arctic I mean to say merchantmen. I put in that proviso—no merchantmen. All the whalers were sailing vessels that went into the Arctic for years. It is only in recent times that steamers have gone into the Arctic Ocean. At the present time both steamers and sailing vessels go into the Arctic Ocean. I understand that a vessel that is conceded to be seaworthy to go on the Pacific Ocean in open waters is seaworthy to go into the Behring Sea in the early part of June, the first of June; and that is the substance of what I have said.

Mr. VAN NESS.—Your Honor reserved two rulings, one in regard to striking out what Mr. Pennell said Mr. Davis said to him; and you also reserved a ruling upon

(Testimony of H. A. Mason.)

the proposition as to whether or not a rescission was necessary before we could make any defense at all. These are rulings which I assume will be made before the case is presented to the jury. Whatever the Court's views are I think we should be advised of in advance.

The COURT.—One question relates solely to the question of the seaworthiness of the ship.

Mr. VAN NESS.—Yes.

The COURT.—If there should be no testimony legitimately tending to prove that this ship was not seaworthy, then the question of rescission would not be material. I am very doubtful upon that question of rescission.

Mr. FRANK.—I do not want to jeopardize any verdict that might be obtained, assuming that we will obtain a verdict in this case, by a decision upon that point, because there are arguments on both sides of it, pro and con. And, as your Honor says, you are yourself in doubt, I will withdraw it. If the ruling should be in my favor, and the verdict also in my favor, I do not want to have that the foundation of any further question.

Mr. VAN NESS.—Then that is withdrawn and out of the case.

The foregoing was all the testimony taken upon the trial material to any of the issues made by the pleadings or any of the rulings of the Court or instructions requested or refused.

At the conclusion of the testimony counsel for defendant requested the Court to charge the jury as follows:

1. Defendant requests the Court to direct the jury to bring in a verdict in favor of defendant.

2. Defendant requests the Court to charge the jury as follows:

Upon the claim of plaintiff for the amount insured upon the cargo under deck, the jury is directed to find in favor of defendant.

3. Defendant requests the Court to charge the jury as follows:

Upon the claim of plaintiff for the amount insured upon the cargo above deck, the jury is directed to find in favor of defendant.

4. If the Court refuses to give the foregoing requests, or any of them, then defendant, excepting to such refusal and each thereof, requests the Court to charge the jury as follows:

5. The policy in this action sued on covered two classes of merchandise, that is, a certain lighterage plant shipped and carried upon the barkentine "Catherine Sudden" above deck, and certain merchandise consisting of coal, lumber and other articles shipped and carried upon said barkentine below deck. In relation to the first lot, to wit, the lighterage plant, it does not appear that any injury or damage resulted thereto from the accident to the barkentine mentioned in the complaint and referred to in the testimony, or that plaintiff, as to said lighterage plant, suffered any loss or damage within the protection of the policy, except in so far as plaintiff was

compelled to pay salvage for the towing of said lighterage plant from the place where the accident to the barkentine occurred to its destination at Nome. The defendant is not liable for the whole of the cost of saving the lighterage plant. Its contract with the plaintiff was to pay such proportion of the salvage cost as the amount for which the plant was insured, to wit, $3,000, bore to the value of the plant. The defendant does not deny that it is liable to the extent named, and you may therefore find a verdict in favor of plaintiff for such proportion of the salvage cost upon the lighterage plant as the sum insured, to wit, $3,000, bears to the value of that plant at Nome at the time of its arrival there. In arriving at the value of the plant you will disregard the valuation put upon the plant in the policy. For the purpose of arriving at the value of the plant at Nome you may take into consideration all the facts and circumstances testified to in this case, from which such value may be fairly and justly arrived at.

6. The burden is upon the plaintiff to prove to you what the actual value of the lighterage plant was. If from the testimony in the case you are able to arrive at the actual value of that plant, you may, as to this part of plaintiff's claim, find for the plaintiff in an amount which will be equal to the proportion that the insurance on the plant bears to such value. But if plaintiff has not proven, and you are not able from the evidence to determine the actual value, then, as to this part of plaintiff's claim, I direct you that you can only find nominal damages. By nominal damages is meant

a trifling sum, as contradistinguished from a substantial sum. A verdict for one dollar, for instance, would be a verdict for nominal damages. You will remember that upon this question of value the valuation in the policy is not determinative of the actual value.

7. The reasonable value of the salvage service rendered by the Corwin Company in rescuing the lighterage plant from the position it was in is an open question in this case. If the jury is satisfied that $2,500 was more than that service was worth, it may so find. The defendant cannot be held liable for a salvage payment in excess of the reasonable value of the service rendered.

8. Plaintiff cannot recover from defendant any portion of the amount paid by it to the salvors for the salvage of the lighterage plant, or any portion of the value of such service, if, in fact, said plant, or any material portion thereof, was not, at the time that Capt. Panno made his bargain with the salvors to pay $2,500 for their towage into Nome, in danger of being lost by reason of the accident to the "Sudden". If from the evidence you find that at the time Capt. Panno made his bargain with the salvors for the towage of the lighterage plant into Nome, that plant was not in danger of being wholly and totally lost, then and in that case your verdict should be for the defendant.

9. In relation to the insurance upon the cargo shipped under deck, and other than the lighterage plant concerning which I have already charged you, I instruct you as follows:

The plaintiff claims and alleges that there was an actual total loss of this merchandise, and has offered no evidence tending to show what the actual loss was if it was in fact less than total. If, therefore, under the instructions which the Court gives, you find that the loss upon this cargo, other than the lighterage plant was not total, then and in that case your verdict must be for the defendant.

10. The defendant did not undertake to pay any loss that plaintiff might suffer by reason of injury to the cargo. The policy provides that it is not to pay anything upon the cargo shipped below deck unless the damage within the protection of the policy shall be equal to at least fifty per cent of the value of such cargo. In the absence of averment or proof fixing the loss at less than total, plaintiff is bound to establish a total loss, or fail, and if plaintiff has not, under the instructions which the Court gives you, established a total loss, your verdict must be for the defendant.

11. I charge you, that if the cargo shipped under deck, or any substantial part of it, arrived at its intended port of destination, and was at said time of any substantial value, that then and in that case there was not, as to said cargo, a total loss, unless the sale at Nome at which said cargo was sold was, in fact, the result of actual necessity, and could not have been avoided by any effort, or efforts, on the part of plaintiff or its agent, or agents, at Nome; and I charge you that the necessity of that sale is not established by proof that the Corwin Company claimed the whole propert

as salvors, or insisted that the property should be sold at the time and place that it was sold. If said sale could have been avoided by any reasonable arrangement with the salvors, it was the duty of plaintiff and plaintiff's agents to make such arrangement, and the burden is upon plaintiff to show that every reasonable effort was made to accomplish this end; and if plaintiff has failed to make proof to this effect, then and in that case you should find that said sale was not a sale of necessity, and if you so find your verdict should be for the defendant.

12. If the value of the salvage service to the cargo under deck was less than the whole value of such cargo when saved, it was the duty of the agent of plaintiff at Nome to induce the salvors to accept the reasonable value of such salvage service, and if such agent made no effort to secure such acceptance of such reasonable value, or otherwise to reduce the loss to the insured and to the defendant as its insurer, plaintiff cannot recover, and your verdict must be for the defendant.

13. In this connection plaintiff alleges and claims a total loss. Under this averment and claim plaintiff must prove a total loss, or fail. If from the evidence you find that a portion of the cargo shipped under deck and covered by the policy sued on was not lost to plaintiff, but in fact came into the possession of plaintiff at Nome, and that the expense to plaintiff in securing the possession and delivery to it of that portion of the cargo was materially less than the value of said portion of

said cargo in the condition in which it was delivered to plaintiff, then and in that case your verdict must be for the defendant.

14. In reaching your finding in this case as to whether the loss upon the cargo under deck was, or was not, total, you cannot take into consideration any estimate as to the value of the salvage service performed by the steamer "Corwin". The value of that service was not fixed by the parties interested, and it is not shown that it has at any time been fixed by any court. What the value of that service was is not an issue upon this trial, and cannot be collaterally determined in this case. Whether the loss upon the cargo under deck was, or was not, total, depends upon other considerations than the value of the salvage service, and must be determined by you under the instructions which the Court gives you, without regard to what the value of that service may have been.

15. I charge you, that if from the facts and circumstances proven in this case you are satisfied and find that, with reasonable effort upon the part of the plaintiff, the Nome Beach Lighterage and Transportation Company, an agreement might have been reached with the salvors, the Corwin Trading Company, fixing the amount to be paid the Corwin Company for salving said cargo, and that the release of said cargo by said salvors upon the payment of a sum less than the value thereof could have been secured, then and in that case you must find that the loss was not total, and your verdict must be in favor of defendant.

16. It is the duty of a party insured under a contract of marine insurance to make such efforts as are within his power to reduce such loss, or losses, as may happen within the protection of the policy, and if he fails in good faith to do so he forfeits any claim against his insurer that he would otherwise have.

17. It was the duty of the plaintiff in this case, the Nome Beach Lighterage and Transportation Company, to have made such efforts as were in its power, or the power of its agent at Nome, to reduce the loss upon the cargo under deck covered by defendant's policy. It was the duty of said plaintiff to have procured, if possible, an arrangement with the salvors fixing a reasonable amount for the salvage services and for the payment thereof. It was the duty of said plaintiff, if possible, to have arranged for, and to have tendered to the salvors such an amount as the salvage service was reasonably worth, and to have endeavored to have secured the acceptance of such amount and the delivery over to plaintiff of the salved cargo. Not only did the law enjoin upon the plaintiff the doing of these things, but the policy especially provides that, and the plaintiff herein, the Nome Beach Lighterage and Transportation Company, for itself, its factors, servants and assigns, engaged and agreed, that it would sue, labor, travel and use all reasonable and proper means for the security, preservation, relief, and recovery of the property insured, or any part thereof; the insurer stipulating upon its part to contribute to any expense properly incurred in the doing of these things or any of them. If the plaintiff, through its agent at Nome, failed to do the things

above enumerated, and, having the power to do so, made no effort to have the amount justly payable for salvage service fixed, and to secure the funds with which to make such payment, and to secure the possession of said cargo, then and in that case your verdict should be for the defendant.

18. If from the evidence you find that the cargo under deck upon the "Catherine Sudden" and covered by the policy was, upon its arrival at Nome, of large value and commercially available as collateral security for money to be borrowed thereon, then and in that case it was the duty of plaintiff's agent at Nome to have made reasonable efforts to borrow such money upon such security as would have enabled plaintiff to have paid to the salvors a reasonable charge for salvage service, if an agreement for such reasonable charge could have been secured; and a failure upon the part of plaintiff, or its agent, to do these things, if they could have been done, would be in violation of plaintiff's obligation to the defendant, and such failure, if such failure there was, will, as to the cargo under deck, defeat paintiff's claim as against defendant.

19. The burden is upon the plaintiff to prove to you that it did, through its agent at Nome, use all proper and reasonably possible efforts to secure an arrangement with the salvors fixing the amount of the salvage charge and for the release of the salved cargo, and if it has failed to prove to you that it did use all such proper and reasonably possible efforts, then and in that case your verdict should be against plaintiff and in favor of defendant.

20. If the loss upon the insured cargo was, in fact, only partial, and not total, such partial loss could not be converted into a total loss because of the sale at Nome, unless the sale itself was necessary and unless, in the conduct of the sale, plaintiff's representatives at Nome took all reasonably proper steps to secure the best obtainable prices for the goods. If the sale itself was not necessary, or if plaintiff's representatives before and at the time of the sale did not take such steps as a reasonably prudent man under similar circumstances should and would have taken to secure the best obtainable prices for the goods sold, then such sale did not make what would otherwise have been a partial loss, if in fact the loss was only partial, into a total loss. And if, under the instructions which the Court gives, you find that the loss was not total, your verdict should be for the defendant.

21. The burden is upon the claimant in this case, to wit, the plaintiff, to show that the sale was necessary; that is, that claimant could not, by doing what a reasonably prudent man having his own interests in view, should and would do, have avoided the selling of the goods under the circumstances under which they were sold. The defendant is not called upon to show that the sale was not necessary, but the burden in that respect, as already stated, rests upon the claimant; and if upon the whole case, you find the necessity of the sale unproven, your verdict upon that point must be in favor of defendant.

22. If when the cargo was sold, it was of a value materially in excess of the price for which it was sold, and

claimant could have bought it in for that price, or for any price materially less than its value, and had the means with which to buy it in, or could have arranged for such money, it was its duty to have done so, and if it failed to do this, and neither claimant nor its agent at Nome took any steps to this end and made no effect to get the property in for the benefit of claimant and its insurer, then and in that case it cannot recover and your verdict should be for defendant.

23. If the cargo owned by claimant sold at the auction at Nome were of a value which, if the goods had been bought in by claimant at the auction, would have been ample security for any advance which claimant might have made in so buying them in, and such purchase within the knowledge of claimant would have made a material reduction in the loss of claimant and of the defendant, and claimant had, or could with reasonable effort have secured, the amount necessary to have so bought them, then and in that case claimant should have bought them in. Its failure to do so, under the circumstances detailed, would be a violation of claimant's duty and its obligation to defendant. Under such circumstances a party insured loses his right to claim the insurance and the insurer is released.

24. Plaintiff is a corporation with its principal office and officers in this city. It could only act at Nome through an agent or agents, and whatever its agent or agents at Nome did or failed to do, the plaintiff did or failed to do. The agent of plaintiff at Nome, at the time of the arrival there of the "Corwin" and "Catherine Sudden," was one Capt. Morine, and the evidence establishes that Capt. Morine at that time was ill, and

being ill requested one Omar J. Humphrey to act for plaintiff in his place, and that Capt. Humphrey did undertake to do so. In case of a sudden emergency an agent has implied authority to take such measures upon behalf of his principal as the special circumstances of the case may seem to require, and under this rule, if Captain Morine was ill and unable to care for the interests of plaintiff resulting from the arrival of the "Catherine Sudden," and her cargo, and was unable to then and there communicate with the officers of the company plaintiff in San Francisco, and the situation was one of emergency and required the attention of someone for and on behalf of plaintiff, then Captain Morine had the power to appoint Humphrey to act for the plaintiff, and by such appointment Humphrey became and was the agent of plaintiff, and whatever Humphrey did or omitted to do in relation to the cargo of the "Catherine Sudden" was the act or omission, as the case might be, of plaintiff. If Humphrey, as such agent, failed to do what plaintiff if at Nome would have done to protect the interests of the insurer and to reduce as far as possible defendant's loss growing out of the wreck of the "Catherine Sudden" then and in that case such failure was the failure of the plaintiff, and if there was such failure within the rules laid down in these instructions, then plaintiff cannot recover and your verdict should be for the defendant.

25. In this case the plaintiff claims an actual total loss. To constitute an actual total loss there must be no rational hope and no practicable possibility of recovering possession of the property, for only when such hope

and possibility have ceased does a loss become an actual total loss.

26. In this case neither the fact that the salvors claimed the right to the exclusive possession of the cargo, if in fact they did so claim, nor the fact that they claimed the whole of the cargo in payment of their salvage service, if they did so claim, made a total loss, if, by any reasonable possibility, the plaintiff, or its agent at Nome, might by negotiation have arranged with the salvors for their salvage service and the re-delivery to plaintiff of said cargo. To make a loss a total loss all reasonably practical possibility of recovering the property must be gone. The fact, if it be a fact, that after arranging and paying for the services of the salvors, if this could have been done, there would have remained a danger that the "Sudden" might be blown out to sea, such fact would not excuse the plaintiff in this case from making all reasonable efforts to arrange with the salvors for the payment of reasonable salvage and the release of the property from the possession of the salvors and from their lien for salvage service. The mere fact that there was a possibility of a subsequent disaster to the property would not excuse the insured from doing what was reasonably necessary to secure repossession of the property, if it was of a value materially in excess of the amount for which it could be redeemed from the salvage lien. It was the duty of the insured to take such reasonable steps as were possible to make this redemption, and then to secure the property against the possibility of further loss.

27. The mere fact that the insured cargo was sold at

auction at the time and place testified to did not, in or of itself, make the loss a total loss.

28. The taking and retaining of possession of the insured cargo by the salvors did not make the loss a total loss. Salvors have the legal right to retain the possession of property salved until the payment to them of whatever may be due for salvage service. But such taking and retention do not make the loss a total loss.

29. If salvors having rightfully taken possession of salved property thereafter wrongfully convert it to their own use, and the insured is by such wrongful conversion deprived of the property, the loss thus suffered is not within the protection of the policy. Such conversion is, in effect, an embezzlement of the property; and for such an embezzlement the insurer is not liable. If in this case the salvors having lawful possession of the insured cargo wrongfully converted it to their own use, whether with or without the consent of the captain, and by reason of such wrongful conversion the property was lost, plaintiff cannot recover for such loss. Such loss was not within the protection of the policy, and defendant is not liable therefor.

30. Upon the arrival of the "Catherine Sudden" at Nome it became the duty of the agent of plaintiff to do whatever might be necessary to obtain possession of the property and to protect the insurer from further unnecessary loss, and this without regard to the refusal of the salvors to deliver possession of the cargo to Captain Panno or in any other respect to comply with Captain Panno's requests or suggestions; and if such agent failed to do what, in this connection, he reasonably might

and should have done, plaintiff cannot recover, and your verdict would be for the defendant.

31. The consent of the witness Gollin to the sale of the insured cargo at Nome, as testified to by him, does not render necessary a finding upon your part that the sale itself was necessary, nor estop the defendant from claiming that it was not necessary.

32. The consent of the witness Gollin to the sale of the insured cargo, as testified to by him, did not relieve the plaintiff and its agents at Nome from the necessity of doing whatever was in their power to arrange with the salvors the value of the salvage service, and for the payment thereof and the recovery of the possession of the insured cargo, and if they neglected to do what they might have done in these particulars plaintiff cannot recover, and your verdict must be for the defendant.

33. The consent of the witness Gollin to the sale of the insured cargo, as testified to by him, did not relieve plaintiff and its agents at Nome from its obligation at that sale to do whatever might have been reasonably possible to protect the defendant from unnecessary loss. If, at that sale, plaintiff might have bought in the insured cargo at a figure materially less than the value of the cargo, and might have arranged for such purchase and for the means of paying the purchase price, then it was the duty of plaintiff and its agents at Nome to have done these things, and if they failed to do so plaintiff cannot recover, and your verdict must be for the defendant.

The duty of plaintiff and plaintiff's agent in the particulars stated did not terminate until all reasonable

possibility of their protecting defendant from unnecessary loss had passed.

The burden is upon the plaintiff to prove, that it could not have prevented the sacrifice of the goods at the auction sale, if in fact they were sacrificed, and if plaintiff has failed to prove this it cannot recover, and your verdict must be for the defendant.

34. If from the evidence you find that Omar J. Humphrey was acting as the agent for plaintiff at Nome immediately preceding the time of the sale, and at the time of the sale, and that in his presence the witness Gollin asked if there were any facilities at Nome for lightering the "Sudden" cargo, and, in the presence of said Humphrey, was told that there were no such facilities, and this statement was untrue, and the said Humphrey was then in possession of a lighterage plant which could and should have been used for lightering said cargo, and did not correct said false statement, if said statement was false, then and in that case the consent of the witness Gollin to said sale does not affect the right of the defendant to claim that said sale was unauthorized and unnecessary.

35. In every marine insurance upon cargo a warranty is implied that the ship upon which said cargo is carried is seaworthy, and a ship is seaworthy only where it is reasonably fit to perform the services and to encounter the ordinary perils of the voyage contemplated by the parties. If you find that the barkentine "Catherine Sudden" was not seaworthy, that is, was not reasonably fit to perform the services and to encounter the ordinary perils of the voyage contemplated by the parties to the policy, your verdict should be for the defendant.

36. Where different portions of a voyage contemplated by a policy differ in respect to the things requisite to make the ship seaworthy therefor, the warranty of seaworthiness is not complied with unless, at the commencement of each portion, the ship is seaworthy with reference to that portion.

37. Unless the barkentine "Catherine Sudden" was so constructed as to be reasonably fit to encounter and survive the peril of ice in the Behring Sea under such circumstances and conditions as were to have been reasonaby anticipated upon the voyage from San Francisco to Nome, then she was not seaworthy; and if you so find, your verdict must be for defendant.

38. An insurer is not exonerated by the negligence of of the insured, or of his agents, or others, but an insurer is not liable for the wilful act of the insured.

If from the evidence you find that the plaintiff, as owner of the "Catherine Suden," dispatched her upon the voyage to Nome, intending and with the understanding that she should sail into the Behring Sea without regard to the presence of ice therein, and that by reason of her construction and condition she was not fit to go into that sea and into the ice therein, and was likely to meet with the accident which in fact befell her, then and in that case your verdict must be for the defendant.

39. In the navigation of the "Catherine Sudden" from San Francisco to Nome the captain of said vessel was the agent and representative of the plaintiff, and if he put his vessel into the ice knowing that she was not fit to go into the ice and was likely to meet with the accident which in fact befell her, plaintiff is responsible for what he did;

and if you find, as already stated, that the master under these circumstances put the vessel into the ice when he should not have done so, then and in that case your verdict must be for the defendant.

40. The plaintiff warranted to the defendant that the "Catherine Sudden" was seaworthy, and every warranty of seaworthyness includes a warranty that the master is competent.

If from the evidence you find that the "Catherine Sudden," under all the circumstances surrounding her voyage from San Francisco to Nome, and while in the Behring Sea, and at the time she was put into the ice, was not properly navigated, and that such failure to properly navigate the vessel was because of the incompetence of her master, then and in that case your verdict should be for the defendant.

41. If from the evidence you find that the sale referred to in the pleadings was, in fact, set aside, or vacated, then and in that case, as to plaintiff's claim for insurance upon the cargo under deck, your verdict should be for defendant.

42. The jury is charged that a statement by Mr. Davis, the agent of the defendant, to the secretary of plaintiff that in his opinion defendant was liable, and to the effect that he thought the loss ought to be paid, accompanied by the further statement that by reason of his relation to his re-insurers he could not pay the loss, does not amount to an admission of liability and in no wise affects the rights of the defendant in this case. If, under the instructions which the Court gives you, you are of the opinion that the defendant is not liable, you will so find,

without regard to any statement of Mr. Davis to Mr. Pennell.

The Court refused to give any instructions requested by defendant, as requested, and charged the jury as follows:

1. Gentlemen of the Jury: The policy sued on covers two classes of merchandise: the lighterage plant, carried above deck, and the merchandise, including coal and lumber, carried below deck. These two classes of property are separately valued in the policy, that above deck being valued at $3,000, and that below deck at $5,250. Where such separate valuation is made, it amounts to separate and distinct insurance upon each lot, so that, in considering the questions that arise, you are to treat these two classes of property, with respect to the nature, extent or proportion of the loss, as having been seperately insured.

2. The values stated in the policy are the values agreed upon between the parties, and are binding and conclusive between them in this action.

3. It does not appear that any injury or damage resulted to the lighterage plant from the accident to the "Catherine Sudden," or that the plaintiff suffered any loss or damage, as to said plant, within the protection of the policy, except in so far as plaintiff was compelled to pay salvage for the towing of said lighterage plant from the place of the accident to Nome. As to such loss, the stipulation of the policy is to the effect that, in case of loss or misfortune resulting from any peril insured against, the insured is to sue, labor and travel and use all reasonable and proper means for the security, preservation and recovery of the property insured, for the expense of which the insurer will contribute in proportion as the sum in-

sured is to the whole sum at risk. The extent of the defendant's liability under this clause, as to the lighterage plant, is such proportion of the cost of saving the plant as the amount for which the plant was insured bore to its valuation, as stated in the policy, which valuation is $3,000. And with respect to said plant, if you find that the "Catherine Sudden" was seaworthy for the voyage, the plaintiff is entitled to recover the $2,500, paid for its salvage, plus the reasonable value of the services rendered by the launch and barge in the discharge of the "Corwin" at Nome.

4. The accident to the vessel by which a hole was stove in her bow and she was almost submerged, was a peril of the sea from which the cargo under deck would have been lost, but for the intervention of the salvors who applied themselves to the rescue. In this way, the vessel and cargo came rightfully into the possession of the salvors, who thereupon and after arriving at Nome with the vessel and cargo, claimed the whole of such cargo under deck for salvage service, and, so claiming, permanently deprived the owners of said property.

5. There were no tribunals at Nome authorized to determine the question of salvage, and no recognized authority in that behalf other than the captain of the revenue cutter then at that place, and who, acting as arbiter in the matter, gave such cargo to the salvors, by whom it was sold, and thereby became and was a total loss to plaintiff within the meaning of the law, and for this loss the defendant is liable, unless the plaintiff might, with reasonable effort on its part, have arranged with the salvors for an adjustment of the salvage claim and the delivery to it of the said cargo.

6. It is the duty of a party insured under a contract of marine insurance to make such efforts as are within his power to reduce such loss, or losses, as may happen within the protection of the policy, and if he fails in good faith to do so, he forfeits any claim against his insured that he would otherwise have.

7. The plaintiff's duly authorized agent at Nome was Morine, whose authority was constituted by a formal power of attorney, without any power of substitution. Morine, being sick, undertook to constitute Humphrey the plaintiff's agent in his, Morine's stead. It is not claimed that Humphrey was in duty bound to advance from his own funds money to satisfy the salvage claim, or to borrow money therefor, and it does not appear that such claim could be satisfied with less than the entire cargo. The contention as to this is that Humphrey should have made every reasonable effort to that end, and, being without means belonging to plaintiff, should have endeavored to hypothecate the salved cargo for such purpose. You may determine whether, under the circumstances, Humphrey was required to make such effort, and, if so, whether the plaintiff is precluded in its right to recover by his failure in that respect. In this connection, you may consider the action taken by Gollin, the insurer's agent, in acquiescing in what was done.

8. The defendant contends that the cargo in question was not lost by a peril of the sea, but that it was wrongfully appropriated by the salvors, and in this respect it is admitted by the plaintiff that some cargo was taken from the vessel by the "Rube Richardson" and the "Pitcairn," and some coal by the "Corwin"; but you will re-

member that the vessel carried a general cargo, for many consignees, and the cargo here in question is only that part of her cargo consigned to the plaintiff.

9. If it were a defense available to the defendant that the cargo was so taken out, as to which question I shall instruct you hereafter, it would not be enough for the defendant to show that some cargo had been so taken out, but he must further show that the cargo so taken out was this particular cargo here insured, and not some other and different cargo. So, also, with respect to the coal taken by the "Corwin."

10. It is further to be noted that, with respect to this coal, there is some evidence tending to show that it was used by the "Corwin" in making steam to enable her to perform the salvage service. If so, it was sacrificed for the common good, and was as much a loss by a peril of the sea as if it had been thrown overboard to lighten the ship and thus enable her to continue her voyage.

11. It does not appear what the proportion of the cargo taken by the "Rube Richardson" and the "Pitcairn" bore to the entire cargo under deck covered by this insurance. If it were in fact part of the cargo here insured, and was but a small proportion thereof, so that, notwithstanding it is saved, that which was lost yet exceeded fifty per cent in value of the cargo insured, it would not be a defense in this case; and likewise with the coal, if the same had been used in performing the salvage service.

12. The law attaches to such an insurance as this what is called a warranty of seaworthiness, that is, a warranty that the ship is reasonably fit to perform the service and to encounter the ordinary perils of the voy-

age contemplated by the parties to the policy. It is not required that the vessel shall be of the very best construction, or have the best equipment that modern science can invent, but only that she shall be reasonably fit to perform the service. Neither is it required that she be fit to encounter extraordinary perils, but only the ordinary perils of the voyage.

13. It is admitted that the "Catherine Sudden" was seaworthy to perform the voyage to Nome in open water, but the claim is that she was not fit to be put into the floating ice of Behring Sea. It is claimed that plaintiff sailed the vessel into such ice, and thereby endangered its safety; that this was not good seamanship or proper care; that, in the exercise of proper care, when ice was encountered, the course of the vessel should have been changed into open water until the danger from ice had passed. These are questions of seamanship, and if contact with ice was a condition which depended upon the discretion and seamanship of the Master, then it becomes a question whether or not the ice is one of the ordinary perils to be encountered on the voyage.

14. Neither the negligence of the Master nor that of the owner relieves the insurer. Nothing short of a willful act of the insured would relieve the insurer. By "willful act of the insured" is not meant an act intentionally or negligently done resulting in the loss of the insured property, even though the negligence be gross, but the act must be one concurred by the insured with the corrupt design of destroying the property, a thing not claimed in this case.

If you find for the plaintiff, gentlemen, you will allow it interest on whatever amount you find at the rate of 7% from the first day of May, 1901.

Defendant, at the conclusion of said charge, and while the jury were still at the bar, duly excepted in writing to the refusal of the Court to give the instructions requested by defendant, and to each separate refusal of the Court to give each separate instruction requested by defendant and to the giving of each instruction given by the Court at the request of plaintiff, and to the giving of each instruction which was in fact given, and its said exceptions and each of them were allowed by the Court.

After being instructed as aforesaid, the case was argued before the jury by the respective counsel. At the close of the argument the jury retired for deliberation, and thereafter returned a verdict for plaintiff in the sum of $9,194.84; and now, in furtherance of justice, and that right may be done; the defendant presents the foregoing as its bill of exceptions in this case, and prays that the same may be settled, allowed and certified as provided by law.

VAN NESS & REDMAN,
Attorneys for Defendant.

It is stipulated and agreed that the foregoing bill of exceptions is correct, but counsel for plaintiff objects to the settlement of the same by the Court.

NATHAN H. FRANK,
Attorney for Plaintiff.

The foregoing bill of exceptions having been presented in due time, and being correct, the same is hereby settled, approved and allowed.

Dated this 10th day of July, 1903.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed July 10, 1903. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),

Plaintiff,

vs.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED (a Corporation),

Defendant.

Petition for Writ of Error.

The Standard Marine Insurance Company, Limited, a corporation, the defendant in the above-entitled action, feeling itself aggrieved by the verdict of the jury and the judgment entered thereupon upon the 19th day of December, 1902, whereby it was adjudged that plaintiff have and recover from defendant the sum of $9,194.84 and costs in the sum of $106.10, comes now by Van Ness & Redman its attorneys, and petitions said Court for an order allowing it, the said defendant, to prosecute a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of a supersedeas bond which the defendant shall give and furnish upon said writ of error, and that upon the giving of such bond all further proceedings in this Court be suspended, stayed, and superseded until the determina-

tion of said writ of error by the said United States Circuit Court of Appeals in and for said Ninth Circuit.

And your petitioner will ever pray, etc.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED,

By VAN NESS & REDMAN,
Its Attorneys.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),
Plaintiff,

vs.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED (a Corporation),
Defendant.

Assignment of Errors.

Now comes The Standard Marine Insurance Company, Limited, the defendant in the above entitled action, by Van Ness & Redman, its attorneys, and specifies the following as the errors upon which it will rely and which it will urge upon its writ of error in the above entitled action, to wit:

I.

That the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California, erred

in overruling defendant's objection to the question propounded to the witness John L. Panno: "Q. What was the reply?"

II.

The said Court erred in denying defendant's motion to strike out the following portion of the testimony of the witness John L. Panno: "He," meaning Captain Tuttle, "gave it all to the 'Corwin.'"

III.

The said Court erred in overruling defendant's objection to the question propounded to the witness W. S. Davis: "Q. Are there any facts that you now know of, or heard of since these proofs were furnished to you, other and different from the facts that were then within your knowledge?"

IV.

The said Court erred in overruling defendant's objection to the question propounded to the witness W. S. Davis: "Q. In stating to these gentlemen that their proofs of loss were sufficient and satisfactory, did the fact that it was stated that Walter Gollin had consented to the sale have any effect on your judgment in the matter?"

V.

The said Court erred in overruling defendant's objection to the question propounded to the witness W. S. Davis: "Q. Mr. Davis, did you consider that the interests of your company were being attended to at Nome by Walter Gollin?"

VI.

The said Court erred in denying defendant's motion to strike out the following testimony given by the witness

W. S. Davis: "A. I did not know, at the time I received notice of the loss, that Mr. Gollin was in Nome representing the underwriters. I did not attend the meeting when Mr. Gollin was appointed agent, but hearing afterwards that he had been appointed agent of the underwriters I was thoroughly satisfied with what he did.

VII.

The said Court erred in denying defendant's motion to strike out the following testimony given by the witness W. S. Davis: "A. Well, in my opinion we did."

VIII.

The said Court erred in overruling defendant's objection to the question propounded to the witness W. S. Davis: "Q. Did this company subsequently make an abandonment of this cargo to you?"

IX.

The said Court erred in overruling defendant's objection to the introduction in evidence of Plaintiff's Exhibit No. 3, being a letter of W. W. Gollin to E. L. Woods.

X.

The said Court erred in overruling defendant's objection to the question propounded to the witness W. W. Gollin: "Q. As such manager, I suppose, you had large experience in marine insurance matters"; and also erred in refusing to strike out the testimony given by said witness in answer to, or following upon the asking of said question.

XI.

The said Court erred in overruling defendant's objection to the question propounded to the witness Albert H.

Herriman: "Q. Let me ask you, Captain, if any particular consignee of that cargo had desired, and had all the facilities, lighters and launches, at his disposal to go out to the 'Catherine Sudden,' and had desired to go out and pick out this particular cargo out of the hold of that vessel, could he, or not, have done it within a reasonable time?"

XII.

The said Court erred in denying defendant's motion to strike out the following portion of the testimony of the witness H. E. Pennell: "In response to this demand I was informed by Mr. Davis that he considered the demand of my company just, and that in all fairness we should receive our money under the policy. Then I asked him why he did not pay it. He said that he would like to pay it, and would pay it, if it were not for the fact that he had reinsured a certain amount of the risk that he carried, and if he paid the amount of our policy he would have in some way to get it from the reinsurers for they had given him to understand that if he paid it they would not pay him; and he said that he did not want to be out his money, as he would have to be until he would, perhaps, have to sue his reinsurers to get his money, and while he felt that we should have it justly, for this reason he could not pay it."

XIII.

The said Court erred in overruling defendant's objection to the admission in evidence of the minutes of the special meeting of the Board of Directors of plaintiff, held June 22d, 1900, and also to the letter following the minutes, addressed to Captain Morine.

XIV.

The said Court erred in overruling defendant's objection to the admission in evidence of the report of Captain Morine referred to in the testimony of the witness H. E. Pennell.

XV.

The said Court erred in overruling defendant's objection to the admission in evidence of a communication from Mr. Humphrey with regard to his accounts and transactions, referred to in the testimony of the witness H. E. Pennell.

XVI.

The said Court erred in overruling defendant's objection to the question propounded to the witness H. A. Mason: "Q. With reference to the practice of sheathing vessels for travel in the Behring Sea from here to Nome, are they generally sheathed, or otherwise?"

XVII.

The said Court erred in overruling defendant's objection to the question propounded to the witness H. A. Mason: "Q. With respect to a vessel that is conceded to be seaworthy in open waters, would you regard her just as seaworthy in the ice that is expected to be met in Behring Sea in that season of the year, whether she had sheathing or did not have sheathing?"

XVIII.

The said Court erred in refusing to direct the jury to bring in a verdict in favor of defendant.

XIX.

The said Court erred in refusing to instruct the jury that upon the claim of plaintiff for the amount insured upon the cargo under deck they should find in favor of defendant.

XX.

The said Court erred in refusing to instruct the jury that upon the claim of plaintiff for the amount insured upon the cargo above deck they should find in favor of defendant.

XXI.

The said Court erred in refusing to give the following instruction requested by defendant: "The policy in this action sued on covered two classes of merchandise, that is, a certain lighterage plant shipped and carried upon the barkentine "Catharine Sudden" above deck, and certain merchandise consisting of coal, lumber, and other articles shipped and carried upon said barkentine below deck. In relation to the first lot, to wit, the lighterage plant, it does not appear that any injury or damage resulted thereto from the accident to the barkentine mentioned in the complaint and referred to in the testimony, or that plaintiff, as to said lighterage plant, suffered any loss or damage wthin the protection of the policy, except in so far as plaintiff was compelled to pay salvage for the towing of said lighterage plant from the place where the accident to the barkentine occurred to its destination at Nome. The defendant is not liable for the whole of the cost of saving the lighterage plant. Its contract with the plaintiff was to pay such propor-

tion of the salvage cost as the amount for which the plant was insured, to wit, $3,000, bore to the value of the plant. The defendant does not deny that it is liable to the extent named, and you may therefore find a verdict in favor of plaintiff for such proportion of the salvage cost upon the lighterage plant as the sum insured, to wit, $3,000, bears to the value of that plant at Nome at the time of its arrival there. In arriving at the value of the plant you will disregard the valuation put upon the plant in the policy. For the purpose of arriving at the value of the plant at Nome you may take into consideration all the facts and circumstances testified to in this case, from which our value may be fairly and justly arrived at."

XXII.

The said Court erred in refusing to give the following instruction requested by defendant: "The burden is upon the plaintiff to prove to you what the actual value of the lighterage plant was. If from the testimony in the case you are able to arrive at the actual value of that plant, you may, as to this part of plaintiff's claim, find for the plaintiff in an amount which will be equal to the proportion that the insurance on the plant bears to such value. But if plaintiff has not proven, and you are not able from the evidence to determine the actual value, then, as to this part of plaintiff's claim, I direct you that you can only find nominal damages. By nominal damages is meant a trifling sum, as contradistinguished from a substantial sum. A ver-

dict for one dollar, for instance, would be a verdict for nominal damages. You will remember that upon this question of value the valuation in the policy is not determinative of the actual value."

XXIII.

The said Court erred in refusing to give the following instruction requested by defendant: "'The reasonable value of the salvage service rendered by the Corwin Company in rescuing the lighterage plant from the position it was in is an open question in this case. If the jury is satisfied that $2,500 was more than that service was worth, it may so find. The defendant cannot be held liable for a salvage payment in excess of the reasonable value of the service rendered."

XXIV.

The said Court erred in refusing to give the following instruction requested by defendant: "Plaintiff cannot recover from defendant any portion of the amount paid by it to the salvors for the salvage of the lighterage plant, or any portion of the value of such service, if, in fact, said plant, or any material portion thereof, was not, at the time that Captain Panno made his bargain with the salvors to pay $2,500 for their towage into Nome, in danger of being lost by reason of the accident to the "Sudden." If from the evidence you find that at the time Captain Panno made his bargain with the salvors for the towage of the lighterage plant into Nome, that plant was not in danger of being wholly and

totally lost, then and in that case your verdict should be for the defendant."

XXV.

The said Court erred in refusing to give the following instruction requested by defendant: "In relation to the insurance upon the cargo shipped under deck, and other than the lighterage plant concerning which I have already charged you, I instruct you as follows: The plaintiff claims and alleges that there was an actual total loss of this merchandise, and has offered no evidence tending to show what the actual loss was, if it was in fact less than total. If, therefore, under the instructions which the Court gives, you find that the loss upon this cargo, other than the lighterage plant, was not total, then and in that case your verdict must be for the defendant."

XXVI.

The said Court erred in refusing to give the following instruction requested by defendant: "The defendant did not undertake to pay any loss that plaintiff might suffer by reason of injury to the cargo. The policy provides that it is not to pay anything upon the cargo shipped below deck unless the damage within the protection of the policy shall be equal to at least fifty per cent of the value of such cargo. In the absence of averment or proof fixing the loss at less than total, plaintiff is bound to establish a total loss, or fail, and if plaintiff has not, under the instructions which the Court gives you, established a total loss, your verdict must be for the defendant."

XXVIII.

The said Court erred in refusing to give the following instruction requested by defendant: "I charge you, that if the cargo shipped under deck, or any substantial part of it, arrived at its intended port of destination, and was at said time of any substantial value, that then and in that case there was not, as to said cargo, a total loss, unless the sale at Nome at which said cargo was sold was, in fact, the result of actual necessity, and could not have been avoided by any effort, or efforts, on the part of plaintiff or its agent, or agents, at Nome; and I charge you that the necessity of that sale is not established by proof that the Corwin Company claimed the whole property as salvors, or insisted that the property should be sold at the time and place that it was sold. If said sale could have been avoided by any reasonable arrangement with the salvors, it was the duty of plaintiff and plaintiff's agents to make such arrangement, and the burden is upon plaintiff to show that every reasonable effort was made to accomplish this end; and if plaintiff has failed to make proof to this effect, then and in that case you should find that said sale was not a sale of necessity, and if you so find you verdict should be for the defendant."

XXVIII.

The said Court erred in refusing to give the following instruction requested by defendant: "If the value of the salvage service to the cargo under deck was less than the whole value of such cargo when saved, it was the

duty of the agent of plaintiff at Nome to induce the salvors to accept the reasonable value of such salvage service, and if such agent made no effort to secure such acceptance of such reasonable value, or otherwise to reduce the loss to the insured and to the defendant as its insurer, plaintiff cannot recover, and your verdict must be for the defendant."

XXIX.

The said Court erred in refusing to give the following instruction requested by defendant: "In this connection plaintiff alleges and claims a total loss. Under this averment and claim plaintiff must prove a total loss, or fail. If from the evidence you find that a portion of the cargo shipped under deck and covered by the policy sued on was not lost to plaintiff, but in fact came into the possession of plaintiff at Nome, and that the expense to plaintiff in securing the possession and delivery to it of that portion of the cargo was materially less than the value of said portion of said cargo in the condition in which it was delivered to plaintiff, then and in that case your verdict must be for the defendant."

XXX.

The said Court erred in refusing to give the following instruction requested by defendant: "In reaching your finding in this case as to whether the loss upon the cargo under deck was, or was not, total, you cannot take into consideration any estimate as to the value of the salvage service performed by the steamer 'Cor-

win.' The value of that service was not fixed by the parties interested, and it is not shown that it has at any time been fixed by any court. What the value of that service was is not an issue upon this trial, and cannot be collaterally determined in this case. Whether the loss upon the cargo under deck was, or was not, total, depends upon other considerations than the value of the salvage service, and must be determined by you under the instructions which the Court gives you, without regard to what the value of that service may have been."

XXXI.

The said Court erred in refusing to give the following instruction requested by defendant: "I charge you, that if from the facts and circumstances proven in this case you are satisfied and find that, with reasonable effort upon the part of the plaintiff, the Nome Beach Lighterage and Transportation Company, an agreement might have been reached with the salvors, The Corwin Trading Company, fixing the amount to be paid the Corwin Company for salving said cargo, and that the release of said cargo by said salvors upon the payment of a sum less than the value thereof could have been secured, then and in that case you must find that the loss was not total, and your verdict must be in favor of defendant."

XXXII.

The said Court erred in refusing to give the following instruction requested by defendant: "It is the duty of a party insured under a contract of marine insurance to

make such efforts as are within his power to reduce such loss, or losses, as may happen within the protection of the policy, and if he fails in good faith to do so he forfeits any claim against his insurer that he would otherwise have."

XXXIII.

The said Court erred in refusing to give the following instruction requested by defendant: "It was the duty of the plaintiff in this case, the Nome Beach Lighterage and Transportation Company, to have made such efforts as were in its power, or the power of its agent at Nome, to reduce the loss upon the cargo under deck covered by defendant's policy. It was the duty of said plaintiff to have procured, if possible, an arrangement with the salvors fixing a reasonable amount for the salvage services and for the payment thereof. It was the duty of said plaintiff, if possible, to have arranged for, and to have tendered to the salvors such an amount as the salvage service was reasonably worth, and to have endeavored to have secured the acceptance of such amount and the delivery over to plaintiff of the salved cargo. Not only did the law enjoin upon the plaintiff the doing of these things, but the policy especially provides that, and the plaintiff herein, the Nome Beach Lighterage and Transportation Company, for itself, its factors, servants and assigns, engaged and agreed, that it would sue, labor, travel, and use all reasonable and proper means for the security, preservation, relief and recovery of the property insured, or any part thereof; the insurer stipulating upon its part to contribute to

any expense properly incurred in the doing of these things, or any of them. If the plaintiff, through its agent at Nome, failed to do the things above enumerated, and, having the power to do so, made no effort to have the amount justly payable for salvage service fixed, and to secure the funds with which to make such payment, and to secure the possession of said cargo, then and in that case your verdict should be for the defendant."

XXIV.

The said Court erred in refusing to give the following instruction requested by defendant: "If from the evidence you find that the cargo under deck upon the 'Catherine Sudden' and covered by the policy was, upon its arrival at Nome, of large value and commercially available as collateral security for money to be borrowed thereon, then and in that case it was the duty of plaintiff's agent at Nome to have made reasonable efforts to borrow such money upon such security as would have enabled plaintiff to have paid to the salvors a reasonable charge for salvage service, if an agreement for such reasonable charge could have been secured; and a failure upon the part of plaintiff, or its agent, to do these things, if they could have been done, would be a violation of plaintiff's obligations to the defendant, and such failure, if such failure there was, will, as to the cargo under deck, defeat plaintiff's claim as against defendant."

XXXV.

The said Court erred in refusing to give the following instruction requested by defendant: "The burden is upon the plaintiff to prove to you that it did, through its agent at Nome, use all proper and reasonably possible efforts to secure an arangement with the salvors fixing the amount of the salvage charge and for the release of the salved cargo, and if it has failed to prove to you that it did use all such proper and reasonably possible efforts then and in that case your verdict should be against plaintiff and in favor of defendant."

XXXVI.

The said Court erred in refusing to give the following instruction requested by defendant: "If the loss upon the insured cargo was, in fact, only partial, and not total, such partial loss could not be converted into a total loss because of the sale at Nome, unless the sale itself was necessary and unless, in the conduct of the sale, plaintiff's representatives at Nome took all reasonably proper steps to secure the best obtainable prices for the goods. If the sale itself was not necessary, or if plaintiff's representatives before and at the time of the sale did not take such steps as a reasonably prudent man under similar circumstances should and would have taken to secure the best obtainable prices for the goods sold, then such sale did not make what would otherwise have been a partial loss, if in fact the loss was only partial, into a total loss. And if, under the instructions which the Court gives, you find that

the loss was not total, your verdict should be for the defendant."

XXXVII.

The said Court erred in refusing to give the following instruction requested by defendant: "The burden is upon the claimant in this case, to wit, the plaintiff, to show that the sale was necessary; that is, that claimant could not, by doing what a reasonably prudent man having his own interests in view, should and would do, have avoided the selling of the goods under the circumstances under which they were sold. The defendant is not called upon to show that the sale was not necessary, but the burden in that respect, as already stated, rests upon the claimant; and if upon the whole case you find the necessity of the sale unproven, your verdict upon that point must be in favor of defendant."

XXXVIII.

The said Court erred in refusing to give the following instruction requested by defendant: "If, when the cargo was sold, it was of a value materially in excess of the price for which it was sold, and claimant would have bought it in for that price, or for any price materially less than its value, and had the means with which to buy it in, or could have arranged for such money, it was its duty to have done so, and if it failed to do this, and neither claimant nor its agent at Nome took any steps to this end and made no effort to get the property in for the benefit of claimant and its insurer, then and in that case it cannot recover and your verdict should be for defendant."

XXXIX.

The said Court erred in refusing to give the following instructions requested by defendant: "If the cargo owned by claimant sold at the auction at Nome were of a value which, if the goods had been bought in by claimant at the auction, would have been ample security for any advance which claimant might have made in so buying them in, and such purchase within the knowledge of claimant would have made a material reduction in the loss of claimant and of the defendant, and claimant had, or could with reasonable effort have secured, the amount necessary to have so bought them, then and in that case claimant should have bought them in. Its failure to do so under the circumstances detailed would be a violation of claimant's duty and its obligation to defendant. Under such circumstances a party insured loses his right to claim the insurance, and the insurer is released."

XL.

The said Court erred in refusing to give the following instruction requested by defendant: "Plaintiff is a corporation with its principal office and officers in this city. It could only act at Nome through an agent or agents, and whatever its agent or agents at Nome did or failed to do the plaintiff did or failed to do. The agent of plaintiff at Nome, at the time of the arrival there of the 'Corwin' and 'Catherine Sudden,' was one Captain Morine, and the evidence establishes that Captain Morine at that time was ill, and being ill requested one Omar J. Humphrey to act for plaintiff in his place, and that Captain Humphrey did undertake to do so. In case

of a sudden emergency an agent has implied authority to take such measures upon behalf of his principal as the special circumstances of the case may seem to require, and under this rule if Captain Morine was ill and unable to care for the interests of plaintiff resulting from the arrival of the 'Catherine Sudden' and her cargo, and was unable to then and there communicate with the officers of the company plaintiff in San Francisco, and the situation was one of emergency and required the attention of some one for and on behalf of plaintiff, then Captain Morine had the power to appoint Humphrey to act for the plaintiff, and by such appointment Humphrey became and was the agent of plaintiff, and whatever Humphrey did or omitted to do in relation to the cargo of the 'Catherine Sudden' was the act or omission, as the case might be, of plaintiff. If Humphrey, as such agent, failed to do what plaintiff if at Nome should have done to protect the interests of the insurer and to reduce as far as possible defendant's loss growing out of the wreck of the 'Catherine Sudden,' then and in that case such failure was the failure of the plaintiff, and if there was such failure within the rules laid down in these instructions, then plaintiff cannot recover and your verdict should be for the defendant."

XLI.

The said Court erred in refusing to give the following instruction requested by defendant: "In this case the plaintiff claims an actual total loss. To constitute an actual total loss there must be no rational hope and no practical possibility of recovering possession of the

property, for only when such hope and possibility have ceased does a loss become an actual total loss."

XLII.

The said Court erred in refusing to give the following instruction requested by defendant: "In this case neither the fact that the salvors claimed the right to the exclusive possession of the cargo, if in fact they did so claim, nor the fact that they claimed the whole of the cargo in payment for their salvage service, if they did so claim, made a total loss, if, by any reasonable possibility, the plaintiff, or its agent at Nome, might by negotiation have arranged with the salvors for their salvage service and the redelivery to plaintiff of said cargo. To make a loss total loss all reasonably practicable possibility of recovering the property must be gone. The fact, if it be a fact, that after arranging and paying for the services of the salvors, if this could have been done, there would have remained a danger that the 'Sudden' might be blown out to sea, such fact would not excuse the plaintiff in this case from making all reasonable efforts to arrange with the salvors for the payment of reasonable salvage and the release of the property from the possession of the salvors and from their lien for salvage service. The mere fact that there was a possibility of a subsequent disaster to the property would not excuse the insured from doing what was reasonably necessary to secure repossession of the property, if it was of a value materially in excess of the amount for which it could be redeemed from the salvage lien. It was the duty of the insured to take such reasonable steps as were

possible to make this redemption, and then to secure the property against the possibility of further loss."

XLIII.

The said Court erred in refusing to give the following instruction requested by defendant: "The mere fact that the insured cargo was sold at auction at the time and place testified to did not, in or of itself, make the loss a total loss."

XLIV.

The said Court erred in refusing to give the following instruction requested by defendant: "The taking and retaining of possession of the insured cargo by the salvors did not make the loss a total loss. Salvors have the legal right to retain the possession of property salved until the payment to them of whatever may be due for salvage service. But such taking and retention do not make the loss a total loss."

XLV.

The said Court erred in refusing to give the following instruction requested by defendant: "If salvors having rightfully taken possession of salved property thereafter wrongfully convert it to their own use, and the insured is by such wrongful conversion deprived of the property, the loss thus suffered is not within the protection of the policy. Such conversion is, in effect, an embezzlement of the property; and for such an embezzlement the insurer is not liable. If in this case the salvors having lawful possession of the insured cargo wrongfully converted it to their own use, whether with or without the consent of the captain, and by reason of such wrongful con-

version the property was lost, plaintiff cannot recover for such loss. Such loss was not within the protection of the policy, and defendant is not liable therefor."

XLVI.

The said Court erred in refusing to give the following instruction requested by defendant: "Upon the arrival of the 'Catherine Sudden' at Nome it became the duty of the agent of plaintiff to do whatever might be necessary to obtain possession of the property and to protect the insurer from further unnecessary loss, and this without regard to the refusal of the salvors to deliver possession of the cargo to Captain Panno or in any other respect to comply with Captain Panno's requests or suggestions; and if such agent failed to do what, in this connection, he reasonably might and should have done, plaintiff cannot recover, and your verdict should be for the defendant."

XLVII.

The said Court erred in refusing to give the following instruction requested by defendant: "The consent of the witness Gollin to the sale of the insured cargo at Nome, as testified to by him, does not render necessary a finding upon your part that the sale itself was necessary, nor estop the defendant from claiming that it was not necessary."

XLVIII.

The said Court erred in refusing to give the following instruction requested by defendant: "The consent of the witness Gollin to the sale of the insured cargo, as testified to by him, did not relieve the plaintiff and its agents at Nome from the necessity of doing whatever

was in their power to arrange with the salvors the value of the salvage service, and for the payment thereof and the recovery of the possession of the insured cargo, and if they neglected to do what they might have done in these particulars plaintiff cannot recover, and your verdict must be for the defendant."

XLIX.

The said Court erred in refusing to give the following instruction requested by defendant: "The consent of the witness Gollin to the sale of the insured cargo, as testified to by him,did not relieve plaintiff and its agents at Nome from its obligation at that sale to do whatever might have been reasonably possible to protect the defendant from unnecessary loss. If, at that sale, plaintiff might have bought in the insured cargo at a figure materially less than the value of the cargo, and might have arranged for such purchase and for the means of paying the purchase price, then it was the duty of plaintiff and its agents at Nome to have done these things, and if they failed to do so plaintiff cannot recover, and your verdict must be for the defendant.

The duty of plaintiff and plaintiff's agents in the particulars stated did not terminate until all reasonable possibility of their protecting defendant from unnecessary loss had passed.

The burden is upon the plaintiff to prove, that it could not have prevented the sacrifice of the goods at the auction sale, if in fact they were sacrificed, and if plaintiff has failed to prove this it cannot recover, and your verdict must be for the defendant."

L.

The said Court erred in refusing to give the following instruction requested by defendant: "If from the evidence, you find that Omar J. Humphrey was acting as the agent for plaintiff at Nome immediately preceding the time of the sale, and at the time of the sale, and that in his presence the witness Gollin asked if there were any facilities at Nome for lightering the 'Sudden' cargo, and, in the presence of said Humphrey, was told that there were no such facilities, and this statement was untrue, and the said Humphrey was then in possession of a lighterage plant which could and should have been used for lightering said cargo, and did not correct said false statement, if said statement was false, then and in that case the consent of the witness Gollin to said sale does not affect the right of the defendant to claim that said sale was unauthorized and unnecessary."

LI.

The said Court erred in refusing to give the following instruction requested by defendant: "In every marine insurance upon cargo a warranty is implied that the ship upon which said cargo is carried is seaworthy, and a ship is seaworthy only where it is reasonably fit to perform the services and to encounter the ordinary perils of the voyage contemplated by the parties. If you find that the barkentine 'Catherine Sudden' was not seaworthy, that is, was not reasonably fit to perform the services and to encounter the ordinary perils of the voyage contemplated by the parties to the policy, your verdict should be for the defendant."

LII.

The said Court erred in refusing to give the following instruction requested by defendant: "Where different portions of a voyage contemplated by a policy differ in respect to the things requisite to make the ship seaworthy therefor, the warranty of seaworthiness is not complied with unless, at the commencement of each portion, the ship is seaworthy with reference to that portion."

LIII.

The said Court erred in refusing to give the following instruction rquested by defendant: "Unless the barkentine 'Catherine Sudden' was so constructed as to be reasonably fit to encounter and survive the peril of ice in the Behring Sea under such circumstances and conditions as were to have been reasonably anticipated upon the voyage from San Francisco to Nome, then she was not seaworthy; and if you so find, your verdict must be for defendant."

LIV.

The said Court erred in refusing to give the following instruction requested by defendant: "An insurer is not exonerated by the negligence of the insured, or of his agents, or others, but an insurer is not liable for the wilful act of the insured.

If from the evidence you find that the plaintiff, as owner of the 'Catherine Sudden,' dispatched her upon the voyage to Nome intending and with the understanding that she should sail into the Behring Sea without regard to the presence of ice therein, and that by reason of her construction and condition she was not fit to go

into that sea and into the ice therein, and was likely to meet with the accident which in fact befell her, then and in that case your verdict must be for the defendant."

LV.

The said Court erred in refusing to give the following instruction requested by defendant: "In the navigation of the 'Catherine Sudden' from San Francisco to Nome the captain of said vessel was the agent and representative of the plaintiff, and if he put his vessel into the ice knowing that she was not fit to go into the ice and was likely to meet with the accident which in fact befell her, plaintiff is responsible for what he did; and if you find, as already stated, that the master under these circumstances put the vessel into the ice when he should not have done so, then and in that case your verdict must be for the defendant."

LVI.

The said Court erred in refusing to give the following instruction requested by defendant: "The plaintiff warranted to the defendant that the 'Catherine Sudden' was seaworthy, and every warranty of seaworthiness includes a warranty that the master is competent.

If from the evidence you find that the 'Catherine Sudden,' under all the circumstances surrounding her voyage from San Francisco to Nome, and while in the Behring Sea, and at the time she was put into the ice, was not properly navigated, and that such failure to properly navigate the vessel was because of the incompetence of her master, then and in that case your verdict should be for the defendant."

LVII.

The said Court erred in refusing to give the following instruction requested by defendant: "If, from the evidence, you find that the sale referred to in the pleadings was, in fact, set aside, or vacated, then and in that case, as to plaintiff's claim for insurance upon the cargo under deck, your verdict should be for defendant."

LVIII.

The said Court erred in refusing to give the following instruction requested by defendant: "The jury is charged that a statement by Mr. Davis, the agent of the defendant, to the secretary of plaintiff that in his opinion defendant was liable, and to the effect that he thought the loss sought to be paid, accompanied by the further statement that by reason of his relation to his reinsurers he could not pay the loss, does not amount to an admission of liability and in no wise affects the rights of the defendant in this case. If, under the instructions which the Court gives you, you are of the opinion that the defendant is not liable, you will so find, without regard to any statement of Mr. Davis to Mr. Pennell."

LIX.

The said Court erred in instructing the jury as follows: "The policy sued on covers two classes of merchandise: the lighterage plant carried above deck, and the merchandise, including coal and lumber, carried below deck. These two classes of property are separately valued in the policy, that above deck being valued at $3,000, and that below deck at $5,250. Where such separate valuation is made, it amounts to separate and distinct insurance upon each lot, so that, in considering the ques-

tions that arise, you are to treat these two classes of property, with respect to the nature, extent, or proportion of the loss, as having been separately insured."

LX.

The said Court erred in instructing the jury as follows: "The values stated in the policy are the values agreed upon between the parties, and are binding and conclusive between them in this action."

LXI.

The said Court erred in instructing the jury as follows: "It does not appear that any injury or damage resulted to the lighterage plant from the accident to the 'Catherine Sudden,' or that the plaintiff suffered any loss or damage as to said plant within the protection of the policy, except in so far as plaintiff was compelled to pay salvage for the towing of said lighterage plant from the place of the accident to Nome. As to such loss, the stipulation of the policy is to the effect that, in case of loss or misfortune resulting from any peril insured against, the insured *is to due*, labor and travel, and use all reasonable and proper means for the security, preservation and recovery of the property insured, for the expense of which the insurer will contribute in proportion as the sum insured is to the whole sum at risk. The extent of defendant's liability under this clause, as to the lighterage plant, is such proportion of the cost of saving the plant as the amount for which the plant was insured bore to its valuation, as stated in the policy, which valuation is $3,000. And with respect to said plant, if you find that the 'Catherine Sudden' was seaworthy for the voyage, the plaintiff is entitled to recover the $2,500 paid for its salvage,

plus the reasonable value of the services rendered by the launch and barge in the discharge of the 'Corwin' at Nome."

LXII.

The said Court erred in instructing the jury as follows: "The accident to the vessel by which a hole was stove in her bow and she was almost submerged, was a peril of the sea from which the cargo under deck would have been lost but for the intervention of the salvors who applied themselves to the rescue. In this way the vessel and cargo came rightfully into the possession of the salvors, who thereupon and after arriving at Nome with the vessel and cargo, claimed the whole of such cargo under deck for salvage service, and, so claiming, permanently deprived the owners of said property."

LXIII.

The said Court erred in instructing the jury as follows: "There were no tribunals at Nome authorized to determine the question of salvage, and no recognized authority in that behalf other than the captain of the revenue cutter then at that place, and who, acting as arbiter in the matter, gave such cargo to the salvors, by whom it was sold, and thereby became and was a total loss to plaintiff within the meaning of the law, and for this loss, the defendant is liable, unless the plaintiff might, with reasonable effort on its part, have arranged with the salvors for an adjustment of the salvage claim and the delivery to it of the said cargo."

LXIV.

The said Court erred in instructing the jury as follows: "It is the duty of a party insured under a contract

of marine insurance to make such efforts as are within his power to reduce such loss, or losses, as may happen within the protection of the policy, and if he fails in good faith to do so, he forfeits any claim against his insured that he would otherwise have."

LXV.

The said Court erred in instructing the jury as follows: "The plaintiff's duly authorized agent at Nome was Morine, whose authority was constituted by a formal power of attorney, without any power of substitution. Morine, being sick, undertook to constitute Humphrey the plaintiff's agent in his, Morine's, stead. It is not claimed that Humphrey was in duty bound to advance from his own funds money to satisfy the salvage claim, or to borrow money therefor, and it does not appear that such claim could be satisfied with less than the entire cargo. The contention as to this is that Humphrey should have made every reasonable effort to that end, and, being without means belonging to plaintiff, should have endeavored to hypothecate the salved cargo for such purpose. You may determine whether, under the circumstances, Humphrey was required to make such effort, and, if so, whether the plaintiff is precluded in its right to recover by his failure in that respect. In this connection you may consider the action taken by Gollin, the insurer's agent, in acquiescing in what was done."

LXVI.

The said Court erred in instructing the jury as follows: "The defendant contends that the cargo in question was not lost by a peril of the sea, but that it was wrongfully appropriated by the salvors, and in this respect it is ad-

mitted by the plaintiff that some cargo was taken from the vessel by the 'Rube Richardson' and the 'Pitcairn,' and some coal by the 'Corwin,' but you will remember that the vessel carried a general cargo, for many consignees, and the cargo here in question is only that part of her cargo consigned to the plaintiff."

LXVII.

The said Court erred in instructing the jury as follows: "If it were a defense available to the defendant that the cargo was so taken out, as to which question I shall instruct you hereafter, it would not be enough for the defendant to show that some cargo had been so taken out, but he must further show that the cargo so taken out was this particular cargo here insured, and not some other and different cargo. So, also, with respect to the coal taken by the 'Corwin.'"

LXVIII.

The said Court erred in instructing the jury as follows: "It is further to be noted that, with respect to this coal, there is some evidence tending to show that it was used by the 'Corwin' in making steam to enable her to perform the salvage service. If so, it was sacrificed for the common good, and was as much a loss by a peril of the sea as if it had been thrown overboard to lighten the ship and thus enable her to continue her voyage."

LXIX.

The said Court erred in instructing the jury as follows: "It does not appear what the proportion of the cargo taken by the 'Rube Richardson' and the 'Pitcairn' bore to the entire cargo under deck covered by this insurance.

If it were, in fact, part of the cargo here insured, and was but a small proportion thereof, so that, notwithstanding it is saved, that which was lost yet exceeded fifty per cent in value of the cargo insured, it would not be a defense in this case; and likewise with the coal, if the same had been used in performing the salvage service."

LXX.

The said Court erred in instructing the jury as follows: "The law attaches to such an insurance as this what is called a warranty of seaworthiness, that is, a warranty that the ship is reasonably fit to perform the service and to encounter the ordinary perils of the voyage contemplated by the parties to the policy. It is not required that the vessel shall be of the very best construction, or have the best equipment that modern science can invent, but only that she shall be reasonably fit to perform the service. Neither is it required that she be fit to encounter extraordinary perils, but only the ordinary perils of the voyage."

LXXI.

The said Court erred in instructing the jury as follows: "It is admitted that the 'Catherine Sudden' was seaworthy to perform the voyage to Nome in open water, but the claim is that she was not fit to be put into the floating ice of Behring Sea. It is claimed that plaintiff sailed the vessel into such ice, and thereby endangered its safety; that this was not good seamanship or proper care; that, in the exercise of proper care, when ice was encountered, the course of the vessel should have been changed into open water until the danger from ice had passed. These are questions of seamanship, and if con-

tact with ice was a condition which depended upon the discretion and seamanship of the master, then it becomes a question whether or not the ice is one of the ordinary perils to be encountered on the voyage."

LXXII.

The said Court erred in instructing the jury as follows: "Neither the negligence of the master nor that of the owner relieves the insurer. Nothing short of a willful act of the insured would relieve the insurer. By 'willful act of the insured' is not meant an act intentionally or negligently done, resulting in the loss of the insured property, even though the negligence be gross, but the act must be one concurred by the insured with the corrupt design of destroying the property, a thing not claimed in this case."

LXXIII.

The said Court erred in entering the judgment herein in favor of plaintiff and against defendant.

VAN NESS & REDMAN,
Attorneys for Defendant.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),

Plaintiff,

vs.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED (a Corporation),

Defendant.

Order Allowing Writ of Error.

Upon motion of the attorneys for the defendant in the above-entitled action, and upon the filing of the foregoing petition for writ of error and assignment of errors:

It is ordered, that a writ of error as prayed for in said petition be allowed, and that the amount of the supersedeas bond to be given by defendant upon said writ of error be, and the same is hereby fixed at, the sum of fifteen thousand (15,000) dollars; and that upon the giving of said bond all further proceedings in this Court be suspended, stayed and superseded pending the determination of said writ of error by the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated, June 16, 1903.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed June 16th, 1903. Southard Hoffman, Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),

Plaintiff,

vs.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND (a Corporation),

Defendant.

Bond on Writ of Error.

Know all men by these presents, that we, The Standard Marine Insurance Company, Limited, of Liverpool, England, a corporation, as principal and the Fidelity and Deposit Company of Maryland a corporation, as surety, are held and firmly bound unto the plaintiff in the above-entitled action in the sum of fifteen thousand (15,000) dollars, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our successors, represntatives and assigns, firmly by these presents.

Sealed with our seals and dated this 17th day of June, 1903.

Whereas the above-named defendant, The Standard Marine Insurance Company, Limited, of Liverpool, England, is about to sue out a writ of error to the United States Circuit Court of Appeals in and for the Ninth Circuit to reverse the judgment entered in the above-entitled action in favor of the plaintiff therein and against the de-

fendant therein, for the sum of nine thousand one hundred and ninety-four and 84-100 (9,194.84) dollars and costs in the sum of one hundred and six and 10-100 (106.10) dollars:

Now, therefore, the condition of this obligation is such, that, if the above-named The Standard Marine Insurance Company, Limited, of Liverpool, England, a corporation shall prosecute such writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

STANDARD MARINE INSURANCE COMPANY OF LIVERPOOL, ENGLAND,

By J. D. SPRECKELS,

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

[Corporate Seal] By EDWARD D. MARTIN,
Its Attorney in Fact.

Approved.

WM. W. MORROW,
Circuit Judge.

POWER OF ATTORNEY.

Know all Men by these Presents, that the Fidelity and Deposit Company of Maryland, by Thos. A. Whelan, its vice-president, and Thos. L. Berry, its assistant secretary, in pursuance of a certain resolution duly passed by the board of directors of said company at a regular meeting of that body held on the 6th day of July, 1898, a copy of which is hereto attached, does hereby nominate, constitute and appoint Edward D. Martin, its

true and lawful agent and attorney in fact, to make execute, seal and deliver for and on its behalf as surety, and as its act and deed any and all bonds or undertakings. And the execution of such bonds and undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if such bond had been duly executed and acknowledged by the regularly elected officers of the company at its office in Baltimore, Maryland, in their own proper persons.

In witness whereof the said Thos. A. Whelan, vice-president, and Thos. L. Berry, assistant secretary, have hereunto subscribed their names and affixed the corporate seal of the said Fidelity and Deposit Company of Maryland, this 20th day of April, A. D. 1903.

Attest:

THOS. A. WHELAN,
Vice-President.

[Seal] THOS. L. BERRY,
Asst. Secretary.

At a regular meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, held at its office in the City of Baltimore, State of Maryland, on the 6th day of July, 1898, the following resolution was unanimously adopted, to wit:

"Whereas, it frequently becomes necessary for a representative of the company to execute a bond on behalf of the company, which, for lack of time or some other cause, it is impossible to have executed by the regularly elected officers of the company;

"Therefore be it resolved, that the President, or either of the vice-presidents, by and with the concurrence of the secretary or assistant secretary, is hereby authorized to empower any representative of the company to execute, on behalf of the company, any bond which the company might execute through its duly elected officers."

We, Thos. A. Whelan, vice-president, and Thos. L. Berry, assistant secretary, of the Fidelity and Deposit Company of Maryland, hereby certify that the foregoing is a true copy taken from the records of proceedings of the Board of Directors of the Fidelity and Deposit Company of Maryland.

In testimony whereof, we have hereunto subscribed our names as vice-president, and assistant secretary, respectively, and affixed the corporate seal of the Fidelity and Deposit Company of Maryland, this 20th day of April, A. D. 1903.

THOS. A. WHELAN,
Vice-president.

[Seal] THOS. L. BERRY,
Asst. Secretary.

State of Maryland, }
City of Baltimore. } ss.

On this 20th day of April, A. D. 1903, before the subscriber, a notary public of the State of Maryland, in and for the city of Baltimore, duly commissioned and qualified, came Thos. A. Whelan, vice-president, and Thos. L. Berry, assistant secretary of the Fidelity and

Deposit Company of Maryland, to me personally known to be the individuals and officers described in, and who executed the preceding power of attorney, and the each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof I have hereunto set my hand and affixed my official seal, at the city of Baltimore, the day and year first above written.

[Seal] FRED. S. AXTELL,
Notary Public.

[Endorsed]: Bond on Writ of Error. Filed June 18, 1903. Southard Hoffman, Clerk. By W. S. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),
Plaintiff,
vs.
THE STANDARD MARINE INSURANCE COMPANY, LIMITED, of Liverpool, England (a Corporation),
Defendant.
No. 13,097.

Clerk's Certificate to Record.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California, do hereby certify the foregoing three hundred and twenty-nine (329) pages, numbered from 1 to 329, inclusive, to be a full, true and correct copy of the record and the proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $204.20, that said amount was paid by the defendant's attorneys, and that the original writ of error and original citation issued herein are hereto annexed.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said Circuit Court, this 7th day of August, A. D. 1903.

[Seal] SOUTHARD HOFFMAN,

Clerk of United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States—to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The Standard Marine Insurance Company, Limited, of Liverpool, England, a corporation, plaintiff in error, and the Nome Beach Lighterage and Transportation Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said The Standard Marine Insurance Company, Limited, of Liverpool, England, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceed-

ings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 17th day of July next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 18th day of June, in the year of our Lord one thousand nine hundred and three.

[Seal] SOUTHARD HOFFMAN,

Clerk of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

Allowed by

WM. W. MORROW,

Judge.

Service of within writ and receipt of a copy thereof is hereby admitted this 18th day of June, 1903.

NATHAN H. FRANK,

Attorney for Defendant in Error.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plant whereof mention is within made, with all things touching the

same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] SOUTHARD HOFFMAN,
Clerk.

[Endorsed]: Original. No. 13,097. Circuit Court of the United States, Ninth Circuit, Northern District of California. The Standard Marine Ins. Co., Plaintiff in Error, vs. Nome Beach L. & T. Co., Defendant in Error, Writ of Error. Filed June 18, 1903. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to Nome Beach Lighterage and Transportation Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error in the clerk's office of the Circuit Court of the United States, for the Northern District of California wherein The

Standard Marine Insurance Company, Limited, of Liverpool, England, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM W. MORROW, United States Circuit Judge for the Ninth Judicial Circuit, at San Francisco, this 18th day of June, A. D. 1903.

WM. W. MORROW,
United States Circuit Judge.

Service of the within citation, by copy, admitted this 18th day of June, A. D. 1903.

NATHAN H. FRANK,
Attorney for Defendant in Error.

[Endorsed]: Original. No. 13,097. In the Circuit Court of the United States for the Ninth Circuit, Northern District of California. The Standard Marine Ins Co., Ltd., vs. Nome Beach L. & T. Co. Citation. Filed June 18, 1903. Southard Hoffman, Clerk. By. W. B. Beaizley, Deputy Clerk.

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land (a Corporation), Plaintiff in Error, vs. Nome Beach Lighterage and Transportation Company (a Corporation), Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Northern District of California.

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No. 979

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND (A CORPORATION),

Plaintiff in Error,

vs.

NOME BEACH LIGHTERAGE & TRANSPORTATION COMPANY (A CORPORATION),

Defendant in Error.

Brief of Plaintiff in Error.

Error to the Circuit Court of the United States for the Northern District of California.

VAN NESS & REDMAN,
Attorneys for Plaintiff in Error.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND (A CORPORATION), *Plaintiff in Error,* *vs.* NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (A CORPORATION), *Defendant in Error.*	No. 979

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

In April of 1900, defendant in error dispatched the barkentine "Catherine Sudden" from San Francisco to Nome, Alaska, laden with a miscellaneous cargo shipped by various parties in San Francisco and consigned to various persons at Nome. The vessel was owned by defendant in error. Laden upon her, and belonging to and shipped by defendant in error to itself, was a miscellaneous assortment of merchandise and a lighterage

plant (for use at Nome) consisting of a steam launch and two lighterage scows.

May 2d, 1900, plaintiff in error issued to defendant in error its policy of insurance covering upon the consigned merchandise of the latter $5,250 and upon its lighterage plant $3,000. The policy provided that the risk thereunder was "to cease at ship's tackle, or thirty days after arrival at destination"; that the adventure upon the insured property or interest should begin "from and immediately following the loading thereof on board said vessel at San Francisco, as aforesaid, and so shall continue and endure until thirty days after arrival or at ship's tackle at Cape Nome aforesaid." (Trans., p. 18.)

In accepting the policy the defendant in error engaged for itself, its factors, servants and assigns "to sue, labor and travel, and use all reasonable and proper means for the security, preservation, relief and recovery of the property insured, or any part thereof; and also to use all proper and legal means to recover, through general average or otherwise, from the parties interested in Vessel, Freight or Cargo, either or all, any sums due the property insured or its owners, on account of sacrifices, losses or expenses incurred for the general safety or the common good." To the charges, if any, so incurred the underwriter agreed to contribute in proportion as the sum insured was to the whole sum at risk. (Trans., p. 19.)

Touching the liability of plaintiff in error in the event of loss, the policy provided that all merchandise not excepted under the memorandum clause was warranted by the insured free from particular average and partial loss,

unless occasioned by stranding, sinking, fire, collision, or other extraordinary peril insured against, and amounting to fifty per cent. or more on the sound value of the whole shipment at the port of delivery, and that such loss should be settled on the principles of salvage loss with benefit of salvage to the insurer. (Trans., p. 20.) To make the case one in which, in view of this warranty, a recovery could be claimed, defendant in error alleged an actual total loss.

The complaint alleges that while the "Sudden" was proceeding upon the voyage, the whole of the insured merchandise and the lighterage plant were lost by perils of the sea, to the damage of the defendant in error in the full sum insured. The story of the so-called loss is set forth in the testimony of Captain Panno (Trans., p. 265 *et seq.*), and is subtantially as follows:

The "Sudden" sailed from San Francisco (April 28th, 1900) under the command of Captain John Panno. About June 1st she went through the Unimak Pass and into the Behring Sea. Within from two to three days after getting out of Unimak Pass ice was sighted on the lea beam. The sea was full of ice, some of the pieces about level with the water and some of them eight or ten feet high. The vessel was sailed right on and into the ice, at times surrounded and shut in, and then, as the ice broke away, making her course through open leads in ice ahead. The vessel was not sheathed or otherwise specially prepared to encounter ice. Struggling to make her way through one of the leads, she struck against the ice, and her port bow was stove in. Captain Panno signaled for help, and two vessels

then within hailing distance, the "Richardson" and the "Pitcairn," came to his assistance. With a view to lightening the "Sudden," the "Pitcairn" and "Richardson," with the consent of Captain Panno, took out of the "Sudden" and removed to the "Pitcairn" and "Richardson" about ten tons of stuff, principally provisions. The bulk of this was taken from the insured shipment of defendant in error. The next day the steamer "Corwin" came along, and undertook to get the "Sudden" and her cargo out of the ice and into Nome. Captain Panno made no arrangement with them concerning the salvage service to the vessel, and none concerning the cargo, except the insured lighterage plant. As to this, the cost of the salvage service was fixed at $2,500, and pursuant to the agreement then effected the launch and lighters were delivered at Nome to defendant in error.

Defendant in error was represented at Nome by one Morine, who, as its agent, had general charge of its business. Prior to the time of the arrival of the "Corwin" with the "Sudden" and her cargo and the launch in tow, Morine had been ill. Anticipating his inability to look after the interests of defendant in error, Morine had appointed one Omar J. Humphrey to take charge of the vessel and cargo, and otherwise, in connection therewith, to represent defendant in error. Humphrey accepted this appointment, and did upon the arrival of the "Corwin" and her tow, take upon himself the representation of defendant in error in all particulars connected with that business. He arranged for the payment of the $2,500 stipulated to be paid for the salvage of the lighterage plant, and took possession of the latter. Under

date of June 11th, 1900, Humphrey, writing as the agent of defendant in error to Mr. Pennell, Secretary of defendant in error, advised the latter of his appointment by Morine, of the agreement for the payment of $2,500 to the "Corwin" people as salvage upon the launches and lighter, and of his payment of that sum and the delivery over to him of the lighterage plant. He further advised Mr. Pennell that he would hold the lighters and launch until advised that the draft had been paid, and that he would in the meantime keep them employed as much as possible, their earnings to be placed against the indebtedness. He expressed the hope that the indebtedness would be wiped out in a very short time. (Trans., pp. 162–4.) That this hope was well founded appears from the statement of Captain Morine who, writing to defendant in error, under date of June 24th, 1900—just thirteen days subsequently—said: "Captain Humphrey has been keeping the boat and lighter employed constantly, and we have about $1,000 to our credit now." (Trans., p. 155.)

With the consent and approval of agent Humphrey a survey was held upon the "Sudden," and it was recommended that she be sold, and she was sold. Upon the demand of the Captain of the "Corwin," agent Humphrey consenting, the miscellaneous cargo upon the "Sudden" was put up at auction and sold. The sale was by manifest lots. The portion of the cargo shipped by defendant in error to itself and sold at this sale consisted of 150 tons of coal, 6000 feet of lumber, 10 anchors and chain, and a miscellaneous lot of provisions, groceries, liquors, etc. These goods were knocked

down for $530, and this money was taken by the "Corwin" people, and has been, so far as we are advised, appropriated to their own use. The auction was held in Nome, and the sale was, as we have said, by manifest lots, the goods remaining in the hold of the vessel anchored off the beach, without examination as to quantity or condition, or otherwise, by the buyers, and without opportunity to examine. Neither Humphrey, the agent of defendant in error, nor Captain Panno, the commander of the vessel, or any other person connected with the defendant in error, took any steps or made any effort to secure an agreement with the salvors fixing a proper salvage charge, or to secure the unloading and delivery of the goods of defendant in error, subject to a salvage lien in favor of the salvors, or for the unloading of the goods prior to the sale, in order that the most advantageous prices might be obtained upon the sale, or with a view to the buying in of the goods if there were not buyers at fair prices. No step was taken and nothing was done to minimize the loss. It is in evidence that, at the time of the sale, coal was worth at Nome approximately $100 per ton. To have lightered it from ship to shore was worth $18.00 per ton. (Trans., pp. 108–9.) Of the 150 tons covered by the policy sued on and consigned to defendant in error, the agent of defendant in error bought in 100 tons, paying therefor $4 per ton. Of this purchase, Morine informed defendant in error by letter under date of August 4th (Trans., pp. 169–170), and for this same coal, so Morine in the same communication informs us (Trans., pp. 170–1), Humphrey obtained $60 per ton.

From the foregoing statement of facts it will be seen that, with the exception of the merchandise belonging to defendant in error, which was taken on board the steamer "Corwin" and the ships "Pitcairn" and "Richardson," the whole of the insured cargo arrived in specie at destination, and that the loss claimed by defendant in error grows out of its sale at Nome under the circumstances detailed. Whether, under those circumstances, the so-called loss was one insured against, that is, was one caused by "a peril of the sea," is one of the questions for decision by this Court. And another is whether or not, in view of the absence of any kind of effort upon the part of the agents of defendant in error at Nome to "sue and labor" for the reduction of the damage, there is any liability upon the part of the plaintiff in error.

Another point upon which we challenge the correctness of the verdict and judgment grows out of a ruling of the Court concerning the effect of the policy valuation of the launch and lighters upon the liability of plaintiff in error for the $2,500 salvage service payment.

We have already called attention to the policy provision imposing upon the insured, its agents and servants, the obligation to "sue, labor, and use all reasonable and proper means for the security, *preservation*, *relief*, *and recovery* of the property insured." To the charge of that kind of expense it is provided that the plaintiff in error should "contribute in proportion as the sum insured is to the whole amount at risk." (Trans., p. 19.) The policy valuation of the lighterage plant was $3,000, and the salvage service payment was $2,500. For the whole of

this latter sum, with interest, the plaintiff in error was, under the sue and labor clause, liable, unless for other reasons to be presently discussed not liable at all, if, as to such character of payment, the policy valuation was controlling. The learned trial judge held that the valuation was controlling, and the whole $2,500 with interest is, under this ruling, included in the verdict. Our contention is, that in calculating the proportion of the $2,500 for which plaintiff in error could be held, if liable at all for this item, the actual value of the launch and lighters at Nome, and not the policy valuation, should have been taken as the basis of the calculation. As we have said, the ruling of the Court was against us upon this point, and this ruling we challenge as error.

Another and important question for decision is this: Is an insurer liable for a loss resulting from the taking of a known and apparent risk, which the captain navigating the vessel, a skillful mariner, should have understood and avoided? In other words, the loss claimed in this case having resulted from the deliberate putting of an unsheathed vessel into the ice of Behring Sea, the injury which was suffered being one that was to have been fairly anticipated, can the plaintiff in error be held accountable for that loss? The learned Circuit Judge held that the willful, although unnecessary, assumption of a known risk does not relieve the insurer from liability. We contend that the law, both upon precedent and principle, is otherwise.

There were certain rulings of the Court upon the admission and rejection of testimony which were excepted to, which we will more particularly notice later on.

ASSIGNMENT OF ERRORS.

The assignment of errors is to be found in the transcript of record, p. 335 *et seq.*

SPECIFICATION OF ERRORS.

1. The Court erred in refusing upon request of plaintiff in error, to direct the jury to bring in a verdict in favor of defendant."

2. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 311.)

"Upon the claim of plaintiff for the amount insured upon the cargo under deck, the jury is directed to find in favor of defendant."

3. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 311.)

"Upon the claim of plaintiff for the amount insured upon the cargo above deck, the jury is directed to find in favor of defendant."

4. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 311.)

"The policy in this action sued on covered two classes of merchandise, that is, a certain lighterage plant shipped and carried upon the barkentine 'Catherine Sudden' above deck, and certain merchandise consisting of coal, lumber and other articles shipped and carried upon said barkentine below deck. In relation to the first lot, to wit, the lighterage plant, it does not appear that any injury or damage resulted thereto from the accident to

the barkentine mentioned in the complaint and referred to in the testimony, or that plaintiff, as to said lighterage plant, suffered any loss or damage within the protection of the policy, except in so far as plaintiff was compelled to pay salvage for the towing of said lighterage plant from the place where the accident to the barkentine occurred to its destination at Nome. The defendant is not liable for the whole of the cost of saving the lighterage plant. Its contract with the plaintiff was to pay such proportion of the salvage cost as the amount for which the plant was insured, to wit, $3000, bore to the value of the plant. The defendant does not deny that it is liable to the extent named, and you may therefore find a verdict in favor of plaintiff for such proportion of the salvage cost upon the lighterage plant as the sum insured, to wit, $3000, bears to the value of that plant at Nome at the time of its arrival there. In arriving at the value of the plant you will disregard the valuation put upon the plant in the policy. For the purpose of arriving at the value of the plant at Nome you may take into consideration all the facts and circumstances testified to in this case, from which such value may be fairly and justly arrived at."

5. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 312.)

"The burden is upon the plaintiff to prove to you what the actual value of the lighterage plant was. If from the testimony in the case you are able to arrive at the actual value of that plant, you may, as to this part of plaintiff's claim, find for the plaintiff in an

amount which will be equal to the proportion that the insurance on the plant bears to such value. But if plaintiff has not proven, and you are not able from the evidence to determine the actual value, then, as to this part of plaintiff's claim, I direct you that you can only find nominal damages. By nominal damages is meant a trifling sum, as contradistinguished from a substantial sum. A verdict for one dollar, for instance, would be a verdict for nominal damages. You will remember that upon this question of value the valuation in the policy is not determinative of the actual value."

6. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 313.)

"The reasonable value of the salvage service rendered by the Corwin Company in rescuing the lighterage plant from the position it was in is an open question in this case. If the jury is satisfied that $2,500 was more than that service was worth, it may so find. The defendant cannot be held liable for a salvage payment in excess of the reasonable value of the service rendered."

7. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 313.)

"Plaintiff cannot recover from defendant any portion of the amount paid by it to the salvors for the salvage of the lighterage plant, or any portion of the value of such service, if, in fact, said plant, or any material portion thereof, was not, at the time that Captain Panno made his bargain with the salvors to pay $2,500 for their towage into Nome, in danger of being lost by reason of

the accident to the 'Sudden.' If from the evidence you find that at the time Captain Panno made his bargain with the salvors for the towage of the lighterage plant into Nome, that plant was not in danger of being wholly and totally lost, then and in that case your verdict should be for the defendant."

8. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 313.)

"In relation to the insurance upon the cargo shipped under deck, and other than the lighterage plant concerning which I have already charged you, I instruct you as follows:

"The plaintiff claims and alleges that there was an actual total loss of this merchandise, and has offered no evidence tending to show what the actual loss was, if it was in fact less than total. If, therefore, under the instructions which the Court gives, you find that the loss upon this cargo, other than the lighterage plant, was not total, then and in that case your verdict must be for the defendant."

9. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 314.)

"The defendant did not undertake to pay any loss that plaintiff might suffer by reason of injury to the cargo. The policy provides that it is not to pay anything upon the cargo shipped below deck unless the damage within the protection of the policy shall be equal to at least fifty per cent. of the value of such cargo. In the absence of averment or proof fixing the loss at less

than total, plaintiff is bound to establish a total loss, or fail, and if plaintiff has not, under the instructions which the Court gives you, established a total loss, your verdict must be for the defendant."

10. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 314.)

"I charge you, that if the cargo shipped under deck, or any substantial part of it, arrived at its intended port of destination, and was at said time of any substantial value, that then and in that case there was not, as to said cargo, a total loss, unless the sale at Nome at which said cargo was sold was, in fact, the result of actual necessity, and could not have been avoided by any effort, or efforts, on the part of plaintiff or its agent, or agents, at Nome; and I charge you that the necessity of that sale is not established by proof that the Corwin Company claimed the whole property, as salvors, or insisted that the property should be sold at the time and place that it was sold. If said sale could have been avoided by any reasonable arrangement with the salvors, it was the duty of plaintiff and plaintiff's agents to make such arrangement, and the burden is upon plaintiff to show that every reasonable effort was made to accomplish this end; and if plaintiff has failed to make proof to this effect, then and in that case you should find that said sale was not a sale of necessity, and if you so find your verdict should be for the defendant."

11. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 315.)

"If the value of the salvage service to the cargo under deck was less than the whole value of such cargo when saved, it was the duty of the agent of plaintiff at Nome to induce the salvors to accept the reasonable value of such salvage service, and if such agent made no effort to secure such acceptance of such reasonable value, or otherwise to reduce the loss to the insured and to the defendant as its insurer, plaintiff cannot recover, and your verdict must be for the defendant."

12. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 315.)

"In this connection plaintiff alleges and claims a total loss. Under this averment and claim plaintiff must prove a total loss, or fail. If from the evidence you find that a portion of the cargo shipped under deck and covered by the policy sued on was not lost to plaintiff, but in fact came into the possession of plaintiff at Nome, and that the expense to plaintiff in securing the possession and delivery to it of that portion of the cargo was materially less than the value of said portion of said cargo in the condition in which it was delivered to plaintiff, then and in that case your verdict must be for the defendant."

13. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 316.)

"In reaching your finding in this case as to whether the loss upon the cargo under deck was, or was not, total, you cannot take into consideration any estimate as to the value of the salvage service performed by

the steamer 'Corwin.' The value of that service was not fixed by the parties interested, and it is not shown that it has at any time been fixed by any court. What the value of that service was is not an issue upon this trial, and cannot be collaterally determined in this case. Whether the loss upon the cargo under deck was, or was not, total, depends upon other considerations than the value of the salvage service, and must be determined by you under the instructions which the Court gives you without regard to what the value of that service may have been."

14. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 316.)

"I charge you, that if from the facts and circumstances proven in this case you are satisfied and find that, with reasonable effort upon the part of the plaintiff, the Nome Beach Lighterage and Transportation Company, an agreement might have been reached with the salvors, the Corwin Trading Company, fixing the amount to be paid the Corwin Company for salving said cargo, and that the release of said cargo by said salvors upon the payment of a sum less than the value thereof could have been secured, then and in that case you must find that the loss was not total, and your verdict must be in favor of defendant."

15. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 317.)

"It is the duty of a party insured under a contract of marine insurance to make such efforts as are within

his power to reduce such loss, or losses, as may happen within the protection of the policy, and if he fails in good faith to do so he forfeits any claim against his insurer that he would otherwise have."

16. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 317.)

"It was the duty of the plaintiff in this case, the Nome Beach Lighterage and Transportation Company, to have made such efforts as were in its power, or the power of its agent at Nome, to reduce the loss upon the cargo under deck covered by defendant's policy. It was the duty of said plaintiff to have procured, if possible, an arrangement with the salvors fixing a reasonable amount for the salvage services and for the payment thereof. It was the duty of said plaintiff, if possible, to have arranged for, and to have tendered to the salvors such an amount as the salvage service was reasonably worth, and to have endeavored to have secured the acceptance of such amount and the delivery over to plaintiff of the salved cargo. Not only did the law enjoin upon the plaintiff the doing of these things, but the policy especially provides that, and the plaintiff herein, the Nome Beach Lighterage and Transportation Company, for itself, its factors, servants and assigns, engaged and agreed, that it would sue, labor, travel and use all reasonable and proper means for the security, preservation, relief, and recovery of the property insured, or any part thereof; the insurer stipulating upon its part to contribute to any expense properly incurred in the doing of these things or any of them. If the plain-

tiff, through its agent at Nome, failed to do the things above enumerated, and having the power to do so, made no effort to have the amount justly payable for salvage service fixed, and to secure the funds with which to make such payment, and to secure the possession of said cargo, then and in that case your verdict should be for the defendant."

17. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 318.)

"If from the evidence you find that the cargo under deck upon the 'Catherine Sudden' and covered by the policy was, upon its arrival at Nome, of large value and commercially available as collateral security for money to be borrowed thereon, then and in that case it was the duty of plaintiff's agent at Nome to have made reasonable efforts to borrow such money upon such security as would have enabled plaintiff to have paid to the salvors a reasonable charge for salvage service, if an agreement for such reasonable charge could have been secured; and a failure upon the part of plaintiff, or its agent, to do these things, if they could have been done, would be in violation of plaintiff's obligation to the defendant, and such failure, if such failure there was, will, as to the cargo under deck, defeat plaintiff's claim as against defendant."

18. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 318.)

"The burden is upon the plaintiff to prove to you that it did, through its agent at Nome, use all proper

and reasonably possible efforts to secure an arrangement with the salvors fixing the amount of the salvage charge and for the release of the salved cargo, and if it has failed to prove to you that it did use all such proper and reasonably possible efforts, then and in that case your verdict should be against plaintiff and in favor of defendant."

19. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 319.)

"If the loss upon the insured cargo was, in fact, only partial, and not total, such partial loss could not be converted into a total loss because of the sale at Nome, unless the sale itself was necessary and unless, in the conduct of the sale, plaintiff's representatives at Nome took all reasonably proper steps to secure the best obtainable prices for the goods. If the sale itself was not necessary, or if plaintiff's representatives before and at the time of the sale did not take such steps as a reasonably prudent man under similar circumstances should and would have taken to secure the best obtainable prices for the goods sold, then such sale did not make what would otherwise have been a partial loss, if in fact the loss was only partial, into a total loss. And if, under the instructions which the Court gives, you find that the loss was not total, your verdict should be for the defendant."

20. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 319.)

"The burden is upon the claimant in this case, to wit, the plaintiff, to show that the sale was necessary;

that is, that claimant could not, by doing what a reasonably prudent man having his own interests in view, should and would do, have avoided the selling of the goods under the circumstances under which they were sold. The defendant is not called upon to show that the sale was not necessary, but the burden in that respect, as already stated, rests upon the claimant; and if upon the whole case, you find the necessity of the sale unproven, your verdict upon that point must be in favor of defendant."

21. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 319.)

"If when the cargo was sold it was of a value materially in excess of the price for which it was sold, and claimant could have bought it in for that price, or for any price materially less than its value, and had the means with which to buy it in, or could have arranged for such money, it was its duty to have done so, and if it failed to do this, and neither claimant nor its agent at Nome took any steps to this end and made no effort to get the property in for the benefit of claimant and its insurer, then and in that case it cannot recover and your verdict should be for defendant."

22. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 320.)

"If the cargo owned by claimant sold at the auction at Nome were of a value which, if the goods had been bought in by claimant at the auction, would have been ample security for any advance which claimant

might have made in so buying them in, and such purchase within the knowledge of claimant would have made a material reduction in the loss of claimant and of the defendant, and claimant had, or could with reasonable effort have secured, the amount necessary to have so bought them, then and in that case claimant should have bought them in. Its failure to do so, under the circumstances detailed, would be a violation of claimant's duty and its obligation to defendant. Under such circumstances a party insured loses his right to claim the insurance and the insurer is released."

23. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 320.)

"Plaintiff is a corporation with its principal office and officers in this city. It could only act at Nome through an agent or agents, and whatever its agent or agents at Nome did or failed to do, the plaintiff did or failed to do. The agent of plaintiff at Nome, at the time of the arrival there of the 'Corwin' and 'Catherine Sudden,' was one Capt. Morine, and the evidence establishes that Capt. Morine at that time was ill, and being ill requested one Omar J. Humphrey to act for plaintiff in his place, and that Capt. Humphrey did undertake to do so. In case of a sudden emergency an agent has implied authority to take such measures upon behalf of his principal as the special circumstances of the case may seem to require, and under this rule, if Captain Morine was ill and unable to care for the interests of plaintiff resulting from the arrival of the 'Catherine Sudden,' and her cargo, and was unable to then

and there communicate with the officers of the company plaintiff in San Francisco, and the situation was one of emergency and required the attention of someone for and on behalf of plaintiff, then Captain Morine had the power to appoint Humphrey to act for the plaintiff, and by such appointment Humphrey became and was the agent of plaintiff, and whatever Humphrey did or omitted to do in relation to the cargo of the 'Catherine Sudden' was the act or omission, as the case might be, of plaintiff. If Humphrey, as such agent, failed to do what plaintiff if at Nome would have done to protect the interests of the insurer and to reduce as far as possible defendant's loss growing out of the wreck of the 'Catherine Sudden' then and in that case such failure was the failure of the plaintiff, and if there was such failure within the rules laid down in these instructions, then plaintiff cannot recover and your verdict should be for the defendant."

24. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 321.)

"In this case the plaintiff claims an actual total loss. To constitute an actual total loss there must be no rational hope and no practicable possibility of recovering possession of the property, for only when such hope and possibility have ceased does a loss become an actual total loss."

25. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 322.)

"In this case neither the fact that the salvors claimed the right to the exclusive possession of the cargo, if in fact they did so claim, nor the fact that they claimed the whole of the cargo in payment of their salvage service, if they did so claim, made a total loss, if, by any reasonable possibility, the plaintiff, or its agent at Nome, might by negotiation have arranged with the salvors for their salvage service and the re-delivery to plaintiff of said cargo. To make a loss a total loss all reasonably practical possibility of recovering the property must be gone. The fact, if it be a fact, that after arranging and paying for the services of the salvors, if this could have been done, there would have remained a danger that the 'Sudden' might be blown out to sea, such fact would not excuse the plaintiff in this case from making all reasonable efforts to arrange with the salvors for the payment of reasonable salvage and the release of the property from the possession of the salvors and from their lien for salvage service. The mere fact that there was a possibility of a subsequent disaster to the property would not excuse the insured from doing what was reasonably necessary to secure repossession of the property, if it was of a value materially in excess of the amount for which it could be redeemed from the salvage lien. It was the duty of the insured to take such reasonable steps as were possible to make this redemption, and then to secure the property against the possibility of further loss."

26. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 322.)

"The mere fact that the insured cargo was sold at auction at the time and place testified to did not, in or of itself, make the loss a total loss."

27. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 323.)

"The taking and retaining of possession of the insured cargo by the salvors did not make the loss a total loss. Salvors have the legal right to retain the possession of property salved until the payment to them of whatever may be due for salvage service. But such taking and retention do not make the loss a total loss."

28. The Court erred in refusing to charge the jury, as required by plaintiff in error, as follows: (Trans., p. 323.)

"If salvors having rightfully taken possession of salved property thereafter wrongfully convert it to their own use, and the insured is by such wrongful conversion deprived of the property, the loss thus suffered is not within the protection of the policy. Such conversion is, in effect, an embezzlement of the property; and for such an embezzlement the insurer is not liable. If in this case the salvors having lawful possession of the insured cargo wrongfully converted it to their own use, whether with or without the consent of the captain, and by reason of such wrongful conversion the property was lost, plaintiff cannot recover for such loss. Such loss was not within the protection of the policy, and defendant is not liable therefor."

29. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 323.)

"Upon the arrival of the 'Catherine Sudden' at Nome it became the duty of the agent of plaintiff to do whatever might be necessary to obtain possession of the property and to protect the insurer from further unnecessary loss, and this without regard to the refusal of the salvors to deliver possession of the cargo to Captain Panno or in any other respect to comply with Captain Panno's requests or suggestions; and if such agent failed to do what, in this connection, he reasonably might and should have done, plaintiff cannot recover, and your verdict would be for the defendant."

30. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 324.)

"The consent of the witness Gollin to the sale of the insured cargo at Nome, as testified to by him, does not render necessary a finding upon your part that the sale itself was necessary, nor estop the defendant from claiming that it was not necessary."

31. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 324.)

"The consent of the witness Gollin to the sale of the insured cargo, as testified to by him, did not relieve the plaintiff and its agents at Nome, from the necessity of doing whatever was in their power to arrange with the salvors the value of the salvage service, and for the payment thereof and the recovery of the possession of the insured cargo, and if they neglected to do what they might have done in these particulars plaintiff cannot recover, and your verdict must be for the defendant."

32. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 324.)

"The consent of the witness Gollin to the sale of the insured cargo, as testified to by him, did not relieve plaintiff and its agents at Nome from its obligation at that sale to do whatever might have been reasonably possible to protect the defendant from unnecessary loss. If, at that sale, plaintiff might have bought in the insured cargo at a figure materially less than the value of the cargo, and might have arranged for such purchase and for the means of paying the purchase price, then it was the duty of plaintiff and its agents at Nome to have done these things, and if they failed to do so plaintiff cannot recover, and your verdict must be for the defendant.

"The duty of plaintiff and plaintiff's agent in the particulars stated did not terminate until all reasonable possibility of their protecting defendant from unnecessary loss had passed.

"The burden is upon the plaintiff to prove, that it could not have prevented the sacrifice of the goods at the auction sale, if in fact they were sacrificed, and if plaintiff has failed to prove this it cannot recover, and your verdict must be for the defendant."

33. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 325.)

"If from the evidence you find that Omar J. Humphrey was acting as the agent for plaintiff at Nome immediately preceding the time of the sale, and at the time

of the sale, and that in his presence the witness Gollin asked if there were any facilities at Nome for lightering the 'Sudden' cargo, and in the presence of said Humphrey, was told that there were no such facilities, and this statement was untrue, and the said Humphrey was then in possession of a lighterage plant which could and should have been used for lightering said cargo, and did not correct said false statement, if said statement was false, then and in that case the consent of the witness Gollin to said sale does not affect the right of the defendant to claim that said sale was unauthorized and unnecessary."

34. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 325.)

"In every marine insurance upon cargo a warranty is implied that the ship upon which said cargo is carried is seaworthy, and a ship is seaworthy only where it is reasonably fit to perform the services and to encounter the ordinary perils of the voyage contemplated by the parties. If you find that the barkentine 'Catherine Sudden' was not seaworthy, that is, was not reasonably fit to perform the services and to encounter the ordinary perils of the voyage contemplated by the parties to the policy, your verdict should be for the defendant."

35. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 326.)

"Where different portions of a voyage contemplated by a policy differ in respect to the things requisite to make the ship seaworthy therefor, the warranty of

seaworthiness is not complied with unless, at the commencement of each portion, the ship is seaworthy with reference to that portion."

36. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 326.)

"Unless the barkentine 'Catherine Sudden' was so constructed as to be reasonably fit to encounter and survive the peril of ice in the Behring Sea under such circumstances and conditions as were to have been reasonably anticipated upon the voyage from San Francisco to Nome, then she was not seaworthy; and if you so find, your verdict must be for defendant."

37. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 326.)

"An insurer is not exonerated by the negligence of the insured, or of his agents, or others, but an insurer is not liable for the wilful act of the insured.

"If from the evidence you find that the plaintiff, as owner of the 'Catherine Sudden,' dispatched her upon the voyage to Nome, intending and with the understanding that she should sail into the Behring Sea without regard to the presence of ice therein, and that by reason of her construction and condition she was not fit to go into that sea and into the ice therein, and was likely to meet with the accident which in fact befell her, then and in that case your verdict must be for the defendant."

39. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 326.)

"In the navigation of the 'Catherine Sudden' from San Francisco to Nome the captain of said vessel was the agent and representative of the plaintiff, and if he put his vessel into the ice knowing that she was not fit to go into the ice and was likely to meet with the accident which in fact befell her, plaintiff is responsible for what he did; and if you find, as already stated, that the master under these circumstances put the vessel into the ice when he should not have done so, then and in that case your verdict must be for the defendant."

40. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 327.)

The plaintiff warranted to the defendant that the 'Catherine Sudden' was seaworthy, and every warranty of seaworthiness includes a warranty that the master is competent.

"If from the evidence you find that the 'Catherine Sudden,' under all the circumstances surrounding her voyage from San Francisco to Nome, and while in the Behring Sea, and at the time she was put into the ice, was not properly navigated, and that such failure to properly navigate the vessel was because of the incompetence of her master, then and in that case your verdict should be for the defendant."

41. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 327.)

"If from the evidence you find that the sale referred to in the pleadings was, in fact, set aside, or vacated, then and in that case, as to plaintiff's claim for

insurance upon the cargo under deck, your verdict should be for defendant."

42. The Court erred in refusing to charge the jury, as requested by plaintiff in error, as follows: (Trans., p. 327.)

"The jury is charged that a statement by Mr. Davis, the agent of the defendant, to the secretary of plaintiff, that in his opinion defendant was liable, and to the effect that he thought the loss ought to be paid, accompanied by the further statement that by reason of his relation to his re-insurers he could not pay the loss, does not amount to an admission of liability and in no wise affects the rights of the defendant in this case. If, under the instructions which the Court gives you, you are of the opinion that the defendant is not liable, you will so find, without regard to any statement of Mr. Davis to Mr. Pennell."

43. The Court erred in charging the jury, as follows:

"The policy sued on covers two classes of merchandise: the lighterage plant, carried above deck, and the merchandise, including coal and lumber, carried below deck. These two classes of property are separately valued in the policy, that above deck being valued at $3000, and that below deck at $5250. Where such separate valuation is made, it amounts to separate and distinct insurance upon each lot, so that, in considering the questions that arise, you are to treat these two classes of property, with respect to the nature, extent or proportion of the loss, as having been separately insured." (Trans., p. 328.)

44. The Court erred in charging the jury, as follows:

"The values stated in the policy are the values agreed upon between the parties, and are binding and conclusive between them in this action." (Trans., p. 328.)

45. The Court erred in charging the jury, as follows:

"It does not appear that any injury or damage resulted to the lighterage plant from the accident to the 'Catherine Sudden,' or that the plaintiff suffered any loss or damage, as to said plant, within the protection of the policy, except in so far as plaintiff was compelled to pay salvage for the towing of said lighterage plant from the place of the accident to Nome. As to such loss, the stipulation of the policy is to the effect that, in case of loss or misfortune resulting from any peril insured against, the insured is to sue, labor and travel and use all reasonable and proper means for the security, preservation and recovery of the property insured, for the expense of which the insurer will contribute in proportion as the sum insured is to the whole sum at risk. The extent of the defendant's liability under this clause, as to the lighterage plant, is such proportion of the cost of saving the plant as the amount for which the plant was insured bore to its valuation, as stated in the policy, which valuation is $3,000. And with respect to said plant, if you find that the 'Catherine Sudden' was seaworthy for the voyage, the plaintiff is entitled to recover the $2,500, paid for its salvage, plus the reasonable value of the services rendered by the launch and barge in the discharge of the 'Corwin' at Nome." (Trans., p. 329.)

46. The Court erred in charging the jury, as follows:

"The accident to the vessel by which a hole was stove in her bow and she was almost submerged, was a peril of the sea from which the cargo under deck would have been lost, but for the intervention of the salvors who applied themselves to the rescue. In this way, the vessel and cargo came rightfully into the possession of the salvors, who thereupon and after arriving at Nome with the vessel and cargo, claimed the whole of such cargo under deck for salvage service, and, so claiming, permanently deprived the owners of said property." (Trans., p. 329.)

47. The Court erred in charging the jury, as follows:

"There were no tribunals at Nome authorized to determine the question of salvage, and no recognized authority in that behalf other than the captain of the revenue cutter then at that place, and who, acting as arbiter in the matter, gave such cargo to the salvors, by whom it was sold, and thereby became and was a total loss to plaintiff within the meaning of the law, and for this loss the defendant is liable, unless the plaintiff might, with reasonable effort on its part, have arranged with the salvors for an adjustment of the salvage claim and the delivery to it of the said cargo." (Trans., p. 329.)

48. The Court erred in charging the jury, as follows:

"The plaintiff's duly authorized agent at Nome was Morine, whose authority was constituted by a formal power of attorney, without any power of substitution.

Morine, being sick, undertook to constitute Humphrey, the plaintiff's agent in his, Morine's stead. It is not claimed that Humphrey was in duty bound to advance from his own funds money to satisfy the salvage claim, or to borrow money therefor, and it does not appear that such claim could be satisfied with less than the entire cargo. The contention as to this is that Humphrey should have made every reasonable effort to that end, and, being without means belonging to plaintiff, should have endeavored to hypothecate the salved cargo for such purpose. You may determine whether, under the circumstances, Humphrey was required to make such effort, and, if so, whether the plaintiff is precluded in its right to recover by his failure in that respect. In this connection, you may consider the action taken by Gollin, the insurer's agent, in acquiescing in what was done." (Trans., p. 330.)

49. The Court erred in charging the jury, as follows:

"The defendant contends that the cargo in question was not lost by a peril of the sea, but that it was wrongfully appropriated by the salvors, and in this respect it is admitted by the plaintiff that some cargo was taken from the vessel by the 'Rube Richardson' and the 'Pitcairn,' and some coal by the 'Corwin'; but you will remember that the vessel carried a general cargo, for many consignees, and the cargo here in question is only that part of her cargo consigned to the plaintiff." (Trans., p. 331.)

50. The Court erred in charging the jury, as follows:

"If it were a defense available to the defendant that the cargo was so taken out, as to which question I

shall instruct you hereafter, it would not be enough for the defendant to show that some cargo had been so taken out, but he must further show that the cargo so taken out was this particular cargo here insured, and not some other and different cargo. So, also, with respect to the coal taken by the 'Corwin.'" (Trans., p. 331.)

51. The Court erred in charging the jury, as follows:

"It is further to be noted that, with respect to this coal, there is some evidence tending to show that it was used by the 'Corwin' in making steam to enable her to perform the salvage service. If so, it was sacrificed for the common good, and was as much a loss by a peril of the sea as if it had been thrown overboard to lighten the ship and thus enable her to continue her voyage." (Trans., p. 331.)

52. The court erred in charging the jury, as follows:

"It does not appear what the proportion of the cargo taken by the 'Rube Richardson' and the 'Pitcairn' bore to the entire cargo under deck covered by this insurance. If it were in fact part of the cargo here insured, and was but a small proportion thereof, so that, notwithstanding it is saved, that which was lost yet exceeded fifty per cent. in value of the cargo insured, it would not be a defense in this case; and likewise with the coal, if the same had been used in performing the salvage service." (Trans., p. 331.)

53. The Court erred in charging the jury, as follows:

"The law attaches to such an insurance as this what is called a warranty of seaworthiness, that is, a warranty that the ship is reasonably fit to perform the service and to encounter the ordinary perils of the voy-

age contemplated by the parties to the policy. It is not required that the vessel shall be of the very best construction, or have the best equipment that modern science can invent, but only that she shall be reasonably fit to perform the service. Neither is it required that she be fit to encounter extraordinary perils, but only the ordinary perils of the voyage." (Trans., p. 332.)

54. The Court erred in charging the jury, as follows:

"It is admitted that the 'Catherine Sudden' was seaworthy to perform the voyage to Nome in open water, but the claim is that she was not fit to be put into the floating ice of Behring Sea. It is claimed that plaintiff sailed the vessel into such ice, and thereby endangered its safety; that this was not good seamanship or proper care; that, in the exercise of proper care, when ice was encountered, the course of the vessel should have been changed into open water until the danger from ice had passed. These are questions of seamanship, and if contact with ice was a condition which depended upon the discretion and seamanship of the Master, then it becomes a question whether or not the ice is one of the ordinary perils to be encountered on the voyage." (Trans., p. 332.)

55. The Court erred in charging the jury, as follows:

"Neither the negligence of the Master nor that of the owner relieves the insurer. Nothing short of a willful act of the insured would relieve the insurer. By 'willful act of the insured' is not meant an act intentionally or negligently done resulting in the loss of the insured property, even though the negligence be gross, but the act must be one concurred in by the insured with the

corrupt design of destroying the property, a thing not claimed in this case." (Trans., p. 332.)

56. The Court erred in charging the jury, as follows:

"If you find for the plaintiff, gentlemen, you will allow it interest on whatever amount you find at the rate of 7% from the first day of May, 1901." (Trans. p. 332.)

57. The Court erred in overruling the question propounded by counsel for plaintiff in error to the witness W. S. Davis, as follows: "Q. In stating to these gentlemen that their proofs of loss were sufficient and satisfactory, did the fact that it was stated that Walter Gollin had consented to the sale have any effect on your judgment in the matter?" To which the answer of the witness was: "Yes, sir; for the reason that I have known Mr. Gollin ever since I have been in the insurance business, and I have great faith in his ability. He has been a representative—he was the representative of the Transatlantic Marine Insurance Company, and settled many losses, and I have always known him to be strictly upright." (Trans., pp. 61–2.)

58. The Court erred in overruling the objection of counsel for plaintiff in error to the question propounded by counsel for defendant in error to the witness W. S. Davis as follows: "Q. Mr. Davis, did you consider that the interests of your company were being attended to at Nome by Walter Gollin?" To which the answer of the witness was: "I did not know, at the time I received notice of the loss, that Mr. Gollin was in Nome representing the underwriters. I did not attend the meeting when Mr. Gollin was appointed agent, but hearing afterwards that he had been appointed agent of the under-

writers, I was thoroughly satisfied with what he did." (Trans., p. 62.)

59. The Court erred in denying the motion of counsel for plaintiff in error to strike out the answer of the witness W. S. Davis as last above set forth, upon the ground that said answer was immaterial, irrelevant and incompetent, and not responsive to the question that was asked. (Trans., p. 62.)

60. The Court erred in overruling the objection of counsel for plaintiff in error to the question propounded by counsel for defendant in error to the witness W. S. Davis as follows: "Q. Did this company subsequently make an abandonment of this cargo to you?" To which the answer of the witness was: "I do not know whether that is the paper or not [referring to an alleged abandonment shown to witness by counsel for defendant in error], but you served an abandonment on us which was returned and not accepted." (Trans., pp. 63–4.)

61. The Court erred in overruling the objection of counsel for plaintiff in error to the question of counsel for the defendant in error propounded to the witness, W. W. Gollin, as follows: "Q. As such manager I suppose you had large experience in marine insurance matters?" To which the answer of the witness was: "Yes, sir; as manager of an insurance company I have adjusted and settled many losses in my time." (Trans., p. 85.)

61. The Court erred in denying motion of counsel for plaintiff in error to strike out the following testimony given by the witness, H. E. Pennell, to-wit: Counsel for defendant in error having asked the witness: "Q. Did

you have any conversations with Mr. Davis, the manager of this company, concerning the payment of the loss and the amount?" The witness answered: "I did; yes, sir. I had those conversations with Mr. Davis from time to time, in the way I have stated, telling him of the loss and asking him as to the mode of collecting under the policy; and as the different information was furnished and considered by Mr. Davis, I continued, of course, on behalf of the company, to demand our insurance money. In response to this demand I was informed by Mr. Davis that he considered the demand of my company just, and that in all fairness we should receive our money under the policy. Then I asked him why he did not pay it. He said that he would like to pay it, and would pay it, if it were not for the fact that he had reinsured a certain amount of the risk that he carried, and if he paid the amount of our policy he would have in some way to get it from the reinsurers, for they had given him to understand that if he paid it they would not pay him; and he said that he did not want to be out his money, as he would have to be until he would, perhaps, have to sue his reinsurers to get his money; and while he felt that we should have it justly, for this reason he could not pay it." The motion was to strike out all of the foregoing answer commencing with and after the words "In response to this demand I was informed." (Trans., pp. 150-1.)

Argument.

I.

THE LOSS UPON THE CARGO OTHER THAN THE LIGHTER AND LAUNCHES WAS NOT CAUSED BY A PERIL OF THE SEA, AND WAS NOT INSURED AGAINST, AND HENCE PLAINTIFF IN ERROR WAS NOT LIABLE THEREFOR.

The vessel carrying the cargo and the cargo itself, with the exception of such portion thereof as was taken on board the "Corwin," the "Pitcairn" and the "Richardson," arrived, in specie, at destination. What may have been the amount and value of that portion of the cargo taken on board the other vessels above named does not appear. Those vessels arrived in due course at Nome (Trans., p. 272). It follows, therefore, that all of the insured cargo outside what may have been consumed en route from the place of the accident to Nome arrived in due course at the latter place. It follows, therefore, that no loss as to the cargo was proven, except such as resulted from the sale of the goods upon the demand of the salvors assented to by the agent of the insured, and none of the lighterage plant outside of the salvage service payment of $2,500.

But it is claimed that the appropriation of the goods put on the relieving vessels, by those vessels, and the sale of the remainder of the cargo by the "Corwin" to satisfy the salvage lien of the latter, was a loss by a peril of the sea, and within the protection of the policy. The

Court sustained this contention, and so instructed the jury (Trans., pp. 330–1). Can this view of the law be sustained?

We do not question that a salvage charge properly adjusted or decreed is a loss for which an insurer is liable, but we do insist that an appropriation by a salvor to its own use of salved goods, without any adjustment of the value of the salvage service, furnishes no basis for a claim against an insurer. And so we insist that a sale by the salvors of the salved property, and an appropriation of the proceeds of that sale without an adjustment or decree fixing the value of the salvage service, does not furnish a foundation for a claim against the insurer. The insurer is doubtless bound to make good to the insured its proportion of the fair value of the salvage service, but until that value has been fixed by a proper adjustment, or by the decree of a competent tribunal, it cannot be said what the value of the salvage service is, nor to what extent the insurer may be called upon to make good the loss. By way of illustration let us suppose an extreme case. A vessel bound from San Francisco to Nome carries a cargo of the value of $100,000 insured for $100,000. Within a few hours' sail of her destination the vessel meets with an accident which calls for assistance which is duly rendered. The value of this service fairly computed is, let us say, $1,000. But the salvor asserts that it is worth the whole value of ship and cargo, and insisting upon this claim, and under circumstances similar to those existing in this case, it puts vessel and cargo up at auction and sells the cargo, we will say, to the person who is at the time acting as the agent of the

insured, for $1,000. Under these circumstances, could it be successfully contended that the insurer would be liable as for a total loss?

Must it not be said, in the case which we have supposed, and in the case at bar, that the damage suffered by the insured is not from a peril of the sea, but by reason of the improper and unlawful conduct of the salvor? It seems to us quite clear that, in the case supposed and in the case at bar, there is no legal causal connection at all between the accident and the subsequent loss to the insured resulting from the improper and unlawful conduct of the salvor; that the latter, within the meaning of the law, is a new, intervening and independent cause, for which the insurer cannot be held responsible.

The position of defendant in error in this case, as we understand it, is, that the sale of the cargo at Nome was forced by the salvors, and that the insured had no control over and could not prevent what was done. Conceding this to be so, their action is against the salvors, and not against the insurer. The insured cargo arrived safely at its destination. The plaintiff in error was not liable for anything less than a total loss, and that which was, in fact, less than a total loss could not, as against plaintiff in error, be converted into a total loss by unauthorized and unlawful conduct upon the part of the salvors. The plaintiff in error did not undertake to make good a loss so occasioned, and should not be held responsible therefor.

Waiving for the moment all criticism of the sale itself, and saying nothing as to the unfairness of accepting the merely nominal amount for which the cargo was sold as

fairly representative of its then value, how can it be said that the loss was a total one, the only loss for which plaintiff in error would be liable? Upon this record this Court cannot say that the salvage service was equal to the proceeds of the sale. That question cannot be collaterally settled in this action. And again, how is the Court to determine the value of the merchandise taken on board the "Corwin," the "Richardson" and the "Pitcairn," and none of which was sold? The law does not recognize the right of the owners, officers or crew of those vessels to appropriate the property taken by them to their own use, and we know of no decision, or any rule of law, which will sustain the claim that the goods thus appropriated were lost by a peril of the sea.

Our contention that a loss resulting from a sale by salvors, either at the port of destination or an intermediate port, is not one resulting from a peril of the sea, and hence not covered by the policy, seems to be well sustained by authority.

De Matos vs. *Saunders*, L. R. 7 c. p. 570.

Barber, Prin. Law Ins., 328.

"Where," says Mr. Barber, "cargo insured 'free of average,' or against total loss only, is landed in a damaged condition owing to sea perils, but a part of it is salable, though not at a profit, and the entire cargo is libeled for salvage in a court of admiralty and sold and the proceeds are distributed under a decree of the Court, the loss is not total, although the entire proceeds of the cargo are thus absorbed. For as the loss from the sea peril was but partial, the proceedings in the court of

admiralty not being the natural or necessary results of that peril, could not change the nature of the loss."

In the *De Matos* case (L. R. 7 C. P. 570) the facts were these: A cargo of salt worth, together with prepaid freight, about £1,900, was insured from Liverpool to Calcutta, the policy containing a memorandum warranting corn, fish, salt &c. free from average unless general or the ship be stranded. Having encountered bad weather, the ship lost both her anchors and had her masts cut away. The ship was taken in tow by salvors and placed on a bank out of the ordinary course of the voyage, where she lay on her port side for several tides and sustained considerable further injury. The salt was landed in a damaged state, and the ship repaired. About one-fifth of the salt might have been made salable, but would have realized no profit. Suits were instituted by the salvors in the admiralty court, and the salt sold under a decree. The entire proceeds of the sale were absorbed by the costs. *Held:* That there was only a *partial* loss upon the salt; *and further held, that the seizure and sale under the decree of the admiralty court was not a natural or necessary consequence of the peril insured against.* Speaking to this point the Court, speaking through *Willes*, J., said: "The contention that the loss, partial at the time it was incurred, was converted into a total loss by the acts of the salvors and the seizure and sale under the orders of the court of admiralty must fail, because those acts and proceedings were not the natural and necessary consequences of a peril insured against. The assured is entitled to recover from the underwriters for a loss arising from sea damage

and its proximate consequences; but it is not a proximate consequence of sea damage in general that there should be proceedings in the court of admiralty; a link is wanting." And the Court added (italics ours): "*As well might it be said that a proceeding by salvors setting up a false claim would convert a partial into a total loss: WHICH WOULD BE ABSURD.*" That which in the mind of the Court in that case would furnish no basis for a claim of total loss, a contention which to the mind of that court would be absurd, is the sole base of the judgment in this case in so far as the merchandise part of the insured cargo is concerned.

In the case at bar it must be conceded, that up to the time that the "Sudden," in tow of the "Corwin," dropped anchor at her port of destination, there had been no loss upon the cargo, and under the doctrine of the *De Matos* case, and within the text of Barber, the forced sale by the salvor did not bring the loss resulting therefrom within the protection of the policy. It may be that, under the sue and labor clause, plaintiff in error, in a properly brought suit, would be held liable for its proportion of a proper salvage charge, but it is certainly not liable because of the assertion of the salvors, uncontested, it seems, by the insured, that the whole cargo and its proceeds were due them in consideration of the service rendered.

What has already been said in relation to the main cargo applies with equal force to the lighterage plant. The policy valuation of that portion of the cargo was $3,000, and the payment for salvage service was only $2,500. The loss was, therefore, less than total, and not

recoverable under the policy unless the $2,500 paid may be claimed under the sue and labor clause.

II.

THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFF IN ERROR WAS LIABLE FOR THE WHOLE OF THE $2,500 PAID FOR THE SALVAGE SERVICE TO THE LIGHTERAGE PLANT.

If we are right in our contention that under the warranty against particular average and partial loss there was no loss within the meaning of the policy either upon cargo or lighterage plant, then the question is presented whether plaintiff in error is liable for any portion of the $2,500 paid the "Corwin" for towing the launch and lighters into Nome. As the lighterage plant was valued by the parties at $3,000, and as the payment for salvage was only $2,500, and this loss was therefore less than total, it follows that plaintiff in error cannot be called upon for any part of the $2,500 paid for salvage, unless it may be so called upon under that provision of the policy that authorizes the insured to sue and labor for the preservation of the property. (And upon the facts in this case it is more than doubtful, as will presently be shown, whether, even under the sue and labor clause, there is any liability for any part of that $2,500.)

The theory of the defendant in error and of the trial judge was that the liability of plaintiff in error as to the $2,500 paid for towing the lighterage plant was under the sue and labor clause. The charge upon this branch of

the case to the jury, which voices the theory of the Court and of counsel for defendant in error, was as follows (Trans., pp. 328-9):

"It does not appear that any injury or damage resulted to the lighterage plant from the accident to the 'Catherine Sudden,' or that the plaintiff suffered any loss or damage, as to said plant, within the protection of the policy, except in so far as plaintiff was compelled to pay salvage for the towing of said lighterage plant from the place of the accident to Nome. As to such loss, the stipulation of the policy is to the effect that, in case of loss or misfortune resulting from any peril insured against, the insured is to sue, labor and travel and use all reasonable and proper means for the security, preservation and recovery of the property insured, for the expense of which the insurer will contribute in proportion as the sum insured is to the whole sum at risk. The extent of the defendant's liability under this clause, as to the lighterage plant, is such proportion of the cost of saving the plant as the amount for which the plant was insured bore to its valuation, as stated in the policy, which valuation is $3,000. And with respect to said plant, if you find that the 'Catherine Sudden' was seaworthy for the voyage, the plaintiff is entitled to recover the $2,500 paid for its salvage, plus the reasonable value of the services rendered by the launch and barge in the discharge of the 'Corwin' at Nome."

To the giving of this instruction plaintiff in error duly excepted (Trans., p. 333).

(a) Our first point upon this branch of the case is that plaintiff in error is not liable for any portion of the

$2500 paid for the towage into Nome of the launch and lighters. The amount paid, as we know, was less than the policy valuation of the plant. The effect of the valuation was, as between the parties, to fix the value of the plant under a loss claim at $3000. (*Cal. Civ. Code*, 2736.) Under the valuation, if the plant had been a total loss, defendant in error could only have recovered $3000, whatever might have been the actual value. The premium charged and collected rested on this base. And this being so, defendant in error has no claim against plaintiff in error, unless, at the time of the making of the agreement to pay $2500 for salvage service, the lighterage plant was in danger of being a total loss.

Barber, Prin. Law Ins., p. 370.

"Where," says Mr. Barber, "the insurance is against total loss only, a claim for expenses incurred under the suing and laboring clause will be disallowed where it is evident from the facts of the case that no danger of a total loss existed."

In support of the text of the work from which we have just quoted the learned author cites,

Peninsular Ry. Co. vs. *Saunders*, 1 Best & Smith, 41;

2 Id., 266.

Booth vs. *Gair*, 15 Com. B. N. S., 291.

Kidston vs. *Empire Ins. Co.*, Law R., 1 C. P. 535;

2 Id. 357.

Upon these authorities we requested the trial judge to charge the jury (Trans., p. 313, request No. 8) that defendant in error, plaintiff below, could not recover any

portion of the amount paid by it to the salvors for the salvage of the lighterage plant, or any portion of the value of such service, if, in fact, said plant, or any material portion thereof, was not at the time the captain of the "Sudden" made his bargain with the salvors to pay $2,500 for their towage into Nome, in danger of being lost by reason of the accident to the "Sudden." This request was refused, and the jury was told that, provided they found against us upon the issue of unseaworthiness, defendant in error was entitled to recover the $2,500 paid for the salvage of the lighterage plant plus the reasonable value of certain services rendered by the launch and barge in the discharge of the "Corwin" at Nome (Trans., p. 329). The latter part of this instruction was based upon certain hearsay (Trans., p. 280) testimony, to the effect that Captain Panno had agreed that the salvors should have for towing the launch and lighters to Nome the service thereof in discharging the "Corwin" in addition to the money payment of $2,500.

In view of the well-settled law as evidenced by the authorities we have cited, we must assume that the Court based its refusal to charge as requested and the charge given upon the theory that the evidence was conclusive to the effect that at the time the salvage agreement was entered into, the lighterage plant, in the absence of that agreement, was doomed to destruction. But we submit that in this the Court was wholly in error, and that the fact was just the other way. The launch and lighters which were towed to Nome were on the deck of the "Sudden," were built for sea service, and could be floated to Nome. The sinking of the "Sudden" would not

have sunk them. At the time of the agreement for salvage service they were afloat in the water, and capable of independent navigation to Nome. Steam was gotten up on the launch, and she was within easy sail of Nome. There is not any testimony to show that either the launch or the lighters were at any time in danger of being lost, and it is apparent, in the nature of things, that they were not. That there was not the slight danger of a loss of the launch or the lighters is made clear by the uncontradicted testimony of Captain Panno, to be found at pages 297–9 of the record, supplemented by that of Captain Simmie, found at pages 279–80. At the time the "Corwin" came alongside the "Sudden," two of the lighters (the scow and one surf-boat) were already safely afloat (p. 297), and the lighter and the other surf boat were on the deck of the "Sudden" so detached that if the "Sudden" had gone down they would have floated (*Id.*). "Everything had been arranged," says Captain Panno, "so that they would be saved if the "Sudden" went down." (*Id.*) The captain of the "Corwin" pulled the launch off the deck of the "Sudden" for what he could pick up on the decks of the latter (p. 298), and then the remaining surf boat came off herself with a little help (*Id.*). It was after this, and after the "Sudden" had been gotten ready for the tow to Nome, that the bargain for salvage service was struck (*Id.* 299). The two surf boats were hoisted back onto the "Sudden," and only the launch and lighter were towed (*Id.*). In anticipation of steaming the launch, with lighters in tow, to Nome, both launch and lighter had taken coal on board from the "Sudden"

(*Id.*). In fact, Captain Panno tell us that it was his intention to steam the launch into Nome with the scow in tow (*Id.*). The launch had "a big steam capacity" (p. 300). We respectfully submit that the trial judge must have overlooked the testimony to which we have referred when preparing his charge to the jury. But in the light of that evidence we also respectfully submit, that refusing to charge as requested, and in charging as he did, the clearest kind of error was committed.

The reason for the rule, as stated in Barber, and in the cases referred to, is, that the insurer being liable only for a total loss, is not at all interested in the prevention of anything less than a total loss, and cannot in the nature of things be asked to contribute to an expense incurred to prevent a loss with which it is not concerned. The insured is, of course, justified in contracting to save the property which threatens a total loss, but if, as in the case at bar, the insured property is not at all in danger of being a total loss, he cannot ask his insurer to contribute to an expense undertaken solely in protection of the interest of the insured.

In reading over the testimony of Captain Panno, which, as we have said is uncontradicted, it is perfectly apparent that the agreement to pay $2,500 was not entered into with a view to saving the launch and lighters from impending peril of loss, but for the purpose of getting them into profitable employment at Nome Beach at the earliest possible moment. With the 150 tons of coal on the "Sudden" for use at Nome Beach in the operation of the launch in lightering from ship to shore, large profits were in sight, as against which the $2,500 went as

nothing. Captain Simmie tells us that the reasonable value at Nome, at that time, of the use of the lighter was $400 per day of 10 hours, and that if worked at night it was worth as much more. In addition to this, the launch could earn $50 per round trip on every tow made (Trans., p. 292). And the lighter was in fact rented for $400 per day (p. 289). In view of this testimony it is not to be wondered at that Captain Panno, as the agent of defendant, was willing to pay $2,500 for a 24-hour tow, but it is entirely clear that this payment was not for either *the security, the preservation, the relief*, or *the recovery* of the launch and lighters, and it was only for the one or the other of these purposes that the insured was authorized to incur expense on behalf of the insurer. The policy expressly so provides (Trans., p. 19), and if the expense incurred was not for the one or the other of these purposes, plaintiff in error is not liable therefor. To *secure* the property against a sea peril, to *preserve* property from damage by reason of a sea peril encountered, to *relieve* it from such a peril, and to *recover* it when it would otherwise, by reason of a sea peril, be wholly lost, were all within the authority of the sue and labor clause of the policy; but not within the widest stretch of the imagination has it ever been supposed that the underwriter was liable under this clause for an expense incurred in merely expediting an otherwise delayed voyage.

(b) If it be held that we are wrong upon the last point discussed, then we submit that the Court erred in ruling that under the sue and labor clause defendant in error could recover the whole of the $2500 paid for sal-

vage service. The provision of the policy is that to such expense as the insured incurs under the sue and labor clause, the insurer is to contribute in the proportion that "the sum insured is to the whole sum at risk." The trial judge ruled, as we understand the ruling, that the sum at risk was the sum insured. In this, we submit, the learned judge was in error. The sum "at risk" within the meaning of the sue and labor clause is neither the sum insured nor the valuation fixed by the policy. The sum at risk, under that clause of the policy, is what the insured stands to lose if the property be lost—the value of the property at the port of destination.

The phraseology of policies of marine insurance is more or less technical, and, as is well understood, this class of contracts has been kept substantially in the form in which they were originally cast, thus frequently necessitating an understanding of the purpose of particular parts of the agreement to determine the precise meaning thereof. Reading the sue and labor clause in the light of such an understanding, its meaning is easily arrived at.

In every contract of marine insurance it is contemplated by the parties that occasions may arise when, by the expenditure of effort or money upon the part of the insured, the insured property may be saved from an impending peril. The insured, personally, or through agents or servants, in touch with the property and in position to save or rescue it from the peril, or, by proper effort, to lessen the amount of the loss, is authorized upon his own behalf, and required upon behalf of the insurer, to sue and labor and make all necessary dis-

bursements to that end. The cost of these efforts is to be paid proportionately by the parties, and it is, as we have seen, so provided in the policy. Of the charges so incurred the insurer is to pay in proportion "as the sum insured is to the whole sum at risk" (Trans., p. 19). The relative interests of the insurer and insured in the property in peril are apparent. The insured is interested to the extent of its liability, the limit of which is the amount insured, while the insured is interested to the extent of the whole value of the property at the port of destination less the proportion thereof protected by the policy. The valuation of the property written in the policy does not at all measure the interest of the insured in the preservation of the property. It may be more or less than the true value. The true interest of each party in the preservation of the property is necessarily the amount which each stands to lose if the property be not saved, and each being to that extent and in that proportion interested in its preservation, it would be but fair that the cost of preserving or rescuing the property from the peril insured against should be shared in that proportion, and such, we have no doubt, is the meaning of the policy provision having relation to that situation.

The error of the trial judge in this connection was, we submit, in reading the words "sum at risk" to mean the sum *at the risk of the insurer*. This is unnecessarily narrowing the effect of the words, and the reason for the stipulation and the whole purpose and spirit thereof clearly indicate that the words "sum at risk" mean not merely the sum at the risk of the insurer, but

the sum at the risk of both parties. Both parties contribute to the payment, and it is because both are interested in saving the property from the peril which may bring about its destruction, that the contribution of each is measured by the proportion that each is interested in the property.

The words "the whole sum at risk" must stand either for the amount insured, the value of the property as stipulated in a valued policy, or, as we contend, the actual value of the property. That, independently of the reasons already urged, these words cannot have either the first or second of the above meanings, is quite clear. If the sum at risk, as used in the policy, is the sum insured, then the provision in effect is that, in every case, the insurer shall pay the expense incurred in the proportion that the sum insured bears to the sum insured, to-wit, the whole of it, which, of course, is not the meaning of the policy. It will be observed that under this construction the limitation of liability is not even measured by the amount of the insurance, and that giving to the phrase its full force, the insurer could be called upon to pay, by way of suing and laboring expense, more than the amount insured. A construction which leads to this result would seem to be absurd.

If, upon the other hand, as held in the instruction of the Court of which we complain, the insurer is to pay in the proportion that the sum insured bears to the valuation, then in every case where the valuation is equal to the insurance, the insurer will also pay the whole of the charges, and the insured will escape altogether, although

he may have as great, or even a greater, interest than the insurer in the saving of the property.

Finally upon this point we suggest that the *whole* sum at risk is *necessarily* the actual value of the property. If in these contracts it be intended that the sue and labor expense shall be paid in the proportion that the sum insured bears to the valuation fixed in the policy, then the word "whole" in the phrase under discussion was unnecessary and, in fact, without meaning. The words "*the whole sum*" at risk very aptly describe the whole interest of both parties in the subject matter of the insurance, but are certainly misleading if intended to mean only so much of the sum at risk as is covered by the valuation fixed in the policy.

We have cited no decision bearing directly upon the point we have been discussing, for the reason that we have found none. The absence of authority arises, we have no doubt, from the fact that it has never before occurred to any one that under the sue and labor clause, the *whole* sum at risk, within the spirit, purpose and meaning of that clause, is anything less than the *whole* sum at the risk of both parties to the contract.

III.

THE FAILURE OF THE AGENT AND REPRESENTATIVE OF THE INSURED AT NOME TO ARRANGE WITH THE SALVORS FOR A PROPER SALVAGE PAYMENT, AND TO SECURE TO THE SALVORS SUCH PAYMENT AND A DELIVERY THEREUPON OF THE INSURED GOODS, AND THE FURTHER FAILURE OF SUCH AGENT AND REPRESENTATIVE TO PROTECT THE PROPERTY FROM SACRIFICE AT A FORCED SALE, VIOLATED A MATERIAL CONDITION OF THE CONTRACT OF INSURANCE AND AVOIDED THE POLICY.

The policy, as we have seen, expressly provides that the insured, its factors and servants, shall sue, labor and travel, and use all reasonable and proper means for the security, preservation, relief and recovery of the property insured, or any part thereof. This clause of the policy is not only permissive but mandatory, and the underwriter is not liable if the insured fails to make such efforts to lessen the loss as a reasonably prudent man ought to make.

Rosetto vs. *Gurney*, 11 C. B. 188.

Understanding the law to be as we have stated (and also understanding that counsel for defendant in error does not contend otherwise), and further understanding the testimony to be without conflict to the effect that neither defendant in error or its agent Morine, or his substitute Humphrey, or the captain of the "Sudden," or

any other "servant" of defendant in error, made any effort, or took any step of any kind to negotiate with the salvors with a view to securing a reasonable salvage charge upon their part, or for the purpose of fixing their charge, or for the securing of the delivery of the insured merchandise to the insured, or to save it, or any part of it, from sacrifice at the sale at Nome, or in any way to limit the loss of the underwriters, we requested the trial judge to instruct the jury to find upon this issue against the defendant in error, and to bring in a verdict against the plaintiff in error. (Trans., p. 311.) This request was refused, and upon this ruling we assign error. (Trans., pp. 328 and 333.)

The Court did instruct the jury that if there had been a breach of the policy stipulation in the particulars referred to, their verdict should be in favor of plaintiff in error, and the jury (as generally happens in this class of cases) found no breach. But we respectfully submit, that as the evidence was without conflict, the Circuit judge should have given the peremptory direction requested.

Under the sue and labor clause of the policy in suit, as we have seen, the insured stipulates that its factors and agents shall "sue, labor and travel, and use all reasonable and proper means for the security, preservation, recovery and relief of the property insured, or any part thereof." Now, did Captain Panno, one of the servants of defendant in error, or Captain Humphrey, its acting agent at Nome, or any person connected with, or in the service of defendant in error, make any effort to do any of these things? The record answers, no.

What might Captain Panno and agent Humphrey have done, and what, under the circumstances, ought any man anxious to prevent the sacrifice and loss of the goods to have done? The first measure of precaution that should have been taken in regard to the goods, after the happening of the accident in the ice, is precisely what Captain Panno did in relation to the lighterage plant. He should have sought to arrange for a reasonable salvage charge. He was under no obligation to make to the "Corwin" people a gift of the ship and cargo for the services of the salvors in saving them. So far as the owners were concerned, they would be no better off, under such an arrangement, than if the vessel and the goods laden thereon went to the bottom. They were within twenty-four hours' steam of Nome, with fair weather and smooth water where free from ice. The service to be performed, and in fact performed, called for no unusual effort, and brought the salvors into no peril. To put a pump and pumping crew on board the "Sudden," and pump out the water, and then make a twenty-four hour tow through smooth water in fair weather was what had to be done, and this certainly was not worth the whole of the vessel and her valuable cargo. The salvors made what seems to have been considered a fair bargain for the salvage of the lighterage plant, and why not for the insured cargo? They did not insist upon keeping the launch and lighters as the price for saving them. With what reason, then, can it be said that a reasonable salvage charge could not have been negotiated for the vessel and cargo? Why Captain Panno did not seek to negotiate therefor we are not told. He simply says that he did

nothing whatever to that end. Arrived at Nome, the vessel with her cargo on board cast anchor and, so far as liability upon the part of plaintiff in error is concerned, outside of its obligation to meet a fair charge for salvage service, was as safely at her destination as if she had met with no accident. The salvage charge for the lighterage plant had been stipulated for, and Captain Humphrey promptly and in a business-like way arranged for the payment of the $2,500 due, and took delivery. There was nothing to prevent him at that time from *making an effort* to secure a similar satisfactory adjustment of the salvage charge upon the insured cargo of defendant in error, but he did not move a finger in that direction. It does not appear that, if approached upon the subject, the salvors would not have made a reasonable charge and a reasonable arrangement for the payment thereof. No one upon behalf of defendant in error asked them to do so, and it is not pretended that anyone did, or that any effort was made to finance the release of the merchandise. The agents of defendant in error were bound by stipulation and by the dictates of the commonest kind of business honesty to have, at least, made an effort to minimize the loss. The ship was at anchor, just as she would have been if she had come in under full sail, the insured goods were on board, and the defendant in error through its agent Humphrey was in possession of a lighter and launches afloat, equipped and manned, with which to lighter the goods from ship to shore. Why, under these circumstances, we again ask, was no effort made to arrange with the salvors the amount of their salvage charge, to finance for this, to

secure the delivery of the goods, and to take them from the vessel to the shore—to do, in fact, what any ordinarily capable business man would certainly have done? The numerous excuses which have been urged by way of answer to this very simple question only accentuate, it seems to us, the utter weakness of the position of defendant in error.

It is said, in the first place, that the "Corwin" people asserted and claimed that they were entitled to the vessel and cargo as compensation for their salvage service. Conceding that they did so, in what way does that fact excuse the defendant in error through its agents at Nome from seeking to make a proper and business-like arrangement with them? Who is there to say, that if such an effort had been made, it would have been unsuccessful? They had negotiated fairly in relation to the lighterage plant; who can authoritatively tell us they would not have done likewise concerning the cargo, if properly approached and properly dealt with? The amount realized at the auction sale for the goods of defendant in error was only one-fourth of the amount for which they were insured, and, as we shall presently show, not over one-thirtieth the value of the 150 tons of coal which were a part of the merchandise consigned to defendant in error. From this it is clear that the salvors were not seeking to absorb the property in specie. If they were satisfied to accept for their salvage service so small a proportion of the value of the consignment to defendant in error, what possible difficulty could there have been in arranging with them for that amount, or, if you please, and if necessary, for a still higher amount?

Up to anything less than the amount of the insurance, there would have been a salvage to the underwriter, and an effort to obtain this salvage it was the duty of defendant in error and its agents to make. The mere fact that the salvors had said they claimed the whole property did not excuse the making of effort to secure a proper adjustment with them, *and it should not be ruled as the law of the insurance contract* that the mere making of such a claim excuses the making of a reasonable effort to secure a proper adjustment of the salvage charge and a delivery of the goods.

The next excuse suggested for the failure of the agents of defendant in error to arrange with the salvors for their salvage charge is, that the financing of the payment of any charge agreed upon might, in the unsettled condition of affairs at Nome, have been difficult. Our answer to this suggestion is that until an effort had been made to reach an agreement with the salvors, it is not possible to say whether there would or would not have been any difficulty in financing the amount agreed upon. We do know that the agent of defendant in error found no difficulty in financing the salvage charge upon the lighterage plant, and this is certainly some evidence that business could be done at Nome in the usual way.

A very simple way of arranging for the payment of any salvage charge that might have been agreed upon would have been to have borrowed the money upon the merchandise at stake, or, if necessary, to have sold sufficient thereof to have made good the amount needed. In the insured consignment to defendant in error there

were 150 tons of coal. Captain Simmie tells us that he knows that coal was worth $100 per ton when the "Sudden" arrived at Nome. (Trans., p. 286.) The witness Moore says it was worth from $100 to $125 per ton (Trans., p. 251). Arthur M. Pope says the average for June was $60. (Trans., p. 247.) Humphrey, the agent of defendant in error, sold to defendant in error during that month coal for which the latter paid $60 per ton. (Trans., pp. 170–1.)

The next excuse for the omission of an effort to reach an agreement with the salvors is, that the "Sudden" with her cargo was at anchor in an open roadstead, and that because there was a possibility of a storm coming up, which might throw her upon the beach, it was necessary to expedite things. The answer to this is apparent. The necessity for expedition, if any there was, did not excuse the making of proper effort under the circumstances to secure the imposition of only a reasonable charge for the salvage service and for the use of all necessary expedition thereafter in the unloading of the vessel. It does not appear that the salvors would not have been willing to take some chances in that direction, and it was at least due to the underwriters that the effort should have been made to have them do so. For a consideration the salvors' steamer, the "Corwin," would, doubtless, have been willing to remain by the "Sudden" until she was discharged, to give her a line in case of danger, and thus do away with any apprehended danger. That this excuse is, under the circumstances, a mere afterthought, is apparent.

The next suggested argument in answer to our objection that there was a breach of the sue and labor clause is that "the beach" at Nome was so crowded with freight that there was no convenient place for the cargo of the "Sudden," and some of the witnesses for plaintiff sought to create this impression. But the very simple answer to this is that the coming in of the "Sudden" in tow, instead of under sail, did not create any new condition upon the beach. Nor did the supposed absence of unloading room in anywise affect the discharge of the vessel's cargo, for it appears from the record that immediately after the sale at auction, with the aid of the saved lighterage plant, the whole of the cargo was successfully discharged and landed upon the beach. The difficulty suggested is wholly one of the imagination, and as with other similar suggestions, nothing but an afterthought. Captain Humphrey, the agent at Nome of defendant in error, had no difficulty in landing one hundred tons of the coal purchased by him at the sale. The fact that this coal was worth at least $60 per ton, the price at which he subsequently "sold" it to defendant in error, will, of course, explain the fact that space on the beach for that particular coal was found, although some of the witnesses would have us believe there was none there.

Lastly, to get away from the effect of their agent's neglect and wrongful conduct at Nome, it is said that banking and financial conditions were such that it would have been difficult to finance any possible arrangement with the salvors. In what way does this excuse the making of the stipulated for effort? The policy does not provide that the insured, or its agents, or servants,

shall succeed in saving the property, or reducing the loss, but that they shall make the effort to do so. In the absence of an effort to come to an arrangement with the salvors, how can it be said that no arrangement was financially possible? Captain Humphrey did successfully finance an arrangement under which the salvage contract as to the lighterage plant was carried out. And who can say that, for a sufficient consideration, the salvors would not have consented to the landing of the cargo and a sale thereof on shore, the salvage to be paid out of the cash proceeds of the sale? The 100 tons of coal, for which the agent of defendant in error paid only $400, would, we know, have brought, on shore, twenty times as much as the whole amount realized for the whole of the insured property sold on shipboard. An effort, at least, should have been made to secure this result, and the underwriter had contracted for this much, and for this much the insured had stipulated. It was almost a certainty that, sold on the vessel, by manifest lots, without opportunity on the part of buyers to examamine as to quantity, quality, or condition, and with no certainty concerning lighterage, the cargo would go as it did, for little or nothing. But with the saved lighterage plant in possession to use in getting the cargo from ship to shore, full value could have been obtained for the coal, lumber and other stuff not subject to sea damage. It would certainly have been to any proper interest which the salvors had to have such a sale, and the fair and necessary presumption is that they would have consented to an arrangement which, under an honest agreement, was to their pecuniary advantage. At any

rate, repeating what we have so often said, it was due to the underwriter that the effort should have been made to bring about such an arrangement as would have reduced the loss. The insured having indemnity against total loss only, cannot, by wilful omission to comply with his contract obligation, turn a partial into a total loss, and then look to the underwriter for payment. If he can so act, he can take advantage of his own wrong, and this is just what the law says cannot be done.

Not only were the agents at Nome of defendant in error derelict in the particulars already noticed, but, independently of their failure to seek to obtain some fair arrangement and settlement with the salvors under which delivery of the insured cargo would have been secured, or, at least, the loss to the underwriter reduced, they were guilty of a breach of the sue and labor stipulation in another particular. They could, when the insured cargo was sold, have bought it in for account of the insured, and under the circumstances they were bound to have done so. As we have seen, the coal and lumber alone were worth, and easily salable at Nome for twenty times more than the whole insured lot sold for; and this being so, the agent of defendant in error could have taken in the whole cargo and have sold so much thereof as might have been necessary to make good the purchase price. With one day's earnings of the lighterage plant, as we shall presently see, the purchase could have been made. He was quick to buy for himself, at $4 per ton, the 100 tons of coal which he subsequently sold to defendant in error for $6,000. How much more of the insured cargo the

same gentleman bought, we do not know. The defendant in error professes to be ignorant on this point, but in view of the value of the cargo in excess of the lump sum for which it was sold ($530), it should have been bought in. To have provided for this was something that an eighteen-year-old boy could have arranged. There was more than sufficient value in the lighterage plant, independently of all other resources, to have done whatever was necessary in this connection.

It may be, and possibly is the fact, that the agent of defendant in error at Nome did not deal honestly with the latter, and took advantage of his opportunity to feather his own nest. That there was crooked work is only too apparent. A simple recital of the facts demonstrates that there was a total disregard of the interests of defendant in error and its insurer. Captain Morine writing to Mr. Pennell, the Secretary of the company, expressed the whole situation tersely, saying:

"There has been some funny business done concerning the disposal of the 'Sudden' and cargo." (Trans., p. 166.)

It is no wonder that Morine thought that there had been some funny business, in view of some of the other facts which he communicated to the Secretary of the company. "Prices on lumber," he wrote, "keep up and fluctuate from $50 per M to $95" (Trans., p. 167); and later on, under date of August 4th, he says:

"The 'Corwin' people at once advertised and sold the 'Sudden' and cargo at auction. *Do not know who authorized them to do so*" (Trans., p. 170).

And again, under the same date:

"I instructed Captain Humphrey to purchase for the N. B. L. & T. Co. the entire lighterage outfit, including tents, house, coal, etc. I afterwards ascertained that all he had purchased for the N. B. L. & T. Co. was the anchors. He purchased 100 tons of coal at $4 per ton, and for the same coal he charged the 'Dorothy' $60 per ton. I know it to be a fact, that Capt. Humphrey managed the N. B. L. & T. Co's plant to his own advantage, which was not to the interest of our Co. I also requested him to put up at once our knock-down lighter, which he did not do. At this time she being worth $400.00 per day, a loss of 10 days, or $4,000.00."

Speaking of the lighterage outfit, Captain Morine placed its value at $20,000 (Trans., p. 155). It is no wonder that, in view of all these facts, he thought "there has been some funny business done concerning the disposal of the 'Sudden' and cargo."

And, in view of the facts referred to by Captain Morine, what is there left of the claim that the insured cargo of defendant in error had to be sacrificed because it was not possible to finance the small sum necessary to buy it in at the nominal figure ($530) for which it was sold; practically not more than one twentieth of its then cash value? With a lighterage plant afloat worth $20,000, a rental value for the lighter (not the knock-down lighter spoken of by Morine, but the one in use) of $400 per day, and an earning capacity for the launch of $50 for each round trip tow, and an earning capacity of an additional $400 per day for the knock-down lighter if put together, all of these being in the possession and under the control of the agent of defendant in error, it is said that the defendant in error was not in a position to negotiate with the salvors, nor to buy in the valuable property

covered by insurance at the pitiful sum for which it was knocked down. That with these undisputed facts upon the record the learned trial judge should, upon this point, have permitted the case to go to the jury was, we submit, wholly wrong.

Upon the trial it was claimed, that as to the failure of defendant in error prior to the sale to negotiate with the salvors an agreement as to the amount of their salvage charges and to arrange, if possible, therefor, that plaintiff in error cannot complain because, it is said, its duly authorized agent consented to the sale. It is a fact that one W. W. Gollin, who was sent to Nome by plaintiff in error and other marine underwriters, under a limited power of attorney which furnished no basis for the alleged consent, arriving at Nome while the sale was progressing did, in entire ignorance of the facts, and without any knowledge as to the value of the cargo, or as to the existence and possession of defendant in error of the lighterage plant, consented that the sale already commenced should proceed.

In relation to this, briefly stated the facts were these: Mr. Gollin went to Nome upon independent business of his own, and knowing that he was going, and that he had some insurance experience, certain underwriters, including plaintiff in error, requested him to act in certain enumerated matters for them. (Trans. of Record, p. 90). In this way he went for them and went under instructions (set forth at length in the Transcript, pp. 67 *et seq.*) conferring upon him the expressly limited power to act "in preserving," for the benefit of whom it might concern, insured vessels and cargoes

wrecked, stranded or damaged during the voyage to Nome, and to prevent losses which might thereby be made probable. (Trans. of Record, p. 67.)

Mr. Gollin landed on the beach at Nome while the sale of the "Catherine Sudden" was in progress, and being informed to that effect, requested that the sale might be temporarily suspended until he could look into the facts. (Trans. of Record, pp. 85–6.) This was assented to, and Mr. Gollin was informed of the accident to the "Sudden," her towage to Nome, that a survey had been held and the sale of the cargo recommended. At least, it is to be inferred that Mr. Gollin was informed to this extent, as in the argument upon behalf of plaintiff, which he injected into his testimony when on the stand (Trans. of Record, p. 87), he gave the Court and jury to understand as much. He also, he says, was shown the newspaper notices of the sale. (Trans. of Record, pp. 89–90). Having so satisfied himself that everything was as it should be, and with only this scant information in hand, he consented that the sale might go on. (Trans. of Record, p. 88.)

Now, in relation to all this, it is first to be observed that Mr. Gollin's instructions and powers did not cover a case of this kind. The power to preserve property, and Gollin's authority was expressly limited to this, (Trans. of Record, p. 67,) did not confer upon him the right to release the insured under policies issued by his principals from the performance of the obligations imposed by the sue and labor clause, nor to consent to unauthorized sales by salvage claimants.

In the next place, it does not appear, nor can it be

claimed, that anything done by Mr. Gollin in anywise changed the situation at Nome, or that the sale was in any way the result of his consent. In fact, the theory upon which defendant in error has proceeded from start to finish has been that the sale was forced by the salvors without regard to the wishes or rights of anyone, and it does not appear that if Mr. Gollin had protested against the sale the salvors would have paid the slightest attention to him. They humored him temporarily, and allowed him to fancy for a few moments that he was a participant in the proceedings. But it is quite apparent that he was handled with about the same ease that the merchandise was, and that nothing that he either said or did cut any figure in the proceedings. His somewhat warm approval of everything that was, in fact, done is quite apparently the result of his desire to justify what he himself did, or rather, perhaps, failed to do. But, as we have suggested, be this as it may, it is certain that Mr. Gollin's failure to do what he should have done, assuming that he had any power to act at all, there being no estoppel, did not justify the insured and its agents from performing their contract obligations.

Finally, upon this branch of the case, it is to be noted that Mr. Gollin's so called consent was based upon his understanding that the insured had not at the time any lighterage facilities. The fact that the insured was as able to get the cargo of the "Sudden" ashore as if she had come in under full sail was not communicated to him by Captain Humphrey, or by any of the salvors, and this most important bit of information we must assume was intentionally withheld. (Trans. of

Record, p. 97.) Of course, a consent so given and so obtained, if otherwise of any significance, cuts no figure whatever. And if the Court will take the trouble to read Mr. Gollin's testimony upon cross-examination (Trans. of Record, pp. 90–99), it will be satisfied that Mr. Gollin's acquaintance with the conditions at Nome, at the time he consented to the sale, was *nil*, and his acquaintance with the rights of insurers, insured, and salvors little better, and that, so far as his having any effect upon the sale goes, he might as well have been taking the temperature at the North Pole.

IV.

IF IT MAY BE SAID THAT THE SALE OF THE MERCHANDISE AT NOME WAS PROXIMATELY CAUSED BY THE INJURY TO THE "SUDDEN" SUFFERED IN THE ICE, THEN THAT INJURY WAS THE RESULT OF A RISK VOLUNTARILY ASSUMED, AND FOR LOSS FROM SUCH A RISK PLAINTIFF IN ERROR IS NOT LIABLE.

It is alleged in the answer that the "Sudden" with its cargo, while proceeding upon her voyage, after passing through and out of Umilak Pass into Behring Sea, met drift ice, and within twenty-four hours thereafter met with large fields of ice, and within forty-eight hours thereafter ran into and was surrounded with heavy ice, and thereafter, and while in said ice, was struck by submerged ice on her port bow and was thereby stove in, and that this was the accident and injury upon which this suit is based (Trans. of Record, pp. 34–5). It is

further alleged that plaintiff sailed the "Sudden" into the ice *"knowing full well that so to do endangered the safety of said vessel," and that so to do was not consistent with good seamanship, or with due and proper care,* and that plaintiff, when ice was encountered, in the exercise of proper care should have changed the course of said vessel and have sought open water, or a port of safety, until danger from ice between San Francisco and Nome had passed. (Trans. of Record, Ans. paragraph 5, pp. 35–6.) The evidence fully sustained this averment of the answer. (Test. John L. Panno, Trans., pp. 263–5.) The whole thing in a nutshell is contained in the Captain's statements (p. 264) that they (meaning himself and others who undertook to push through the ice) wanted to "market their goods," and that he "went right into it [the ice], still *fighting* to get up to Nome. He lay in the ice—stuck in it—until he got a lead, and *"kept working up through it"* (p. 264). Finally "he hit a piece of ice" (*id.*). "The vessel hit it and knocked her bow in" (*id.*). The moment he struck the ice there was a hole in his bow (*id.*). Then he put his colors down and signaled for help (*id.*). May a loss so suffered be said to to be a peril of the sea?

The ruling of the Circuit Court is, that an insurer is liable for a loss resulting from a peril intelligently and intentionally incurred, unless such intentional running of the foreseen and understood peril is itself *part of a corrupt design to destroy the insured property.* The trial judge so charged (Instruction 14, p. 332). We venture to submit that this doctrine is without a shadow of support in the law, is distinctly discountenanced by adjudicated cases, and is opposed to common sense and good morals.

Let us suppose a case. A, covered by insurance upon vessel and cargo sailing from San Francisco to Cape St. Lucas, has, at a particular point in the voyage, a choice between the open sea and a dangerous inland passage. He knows that the inland passage is dangerous, that there are uncharted reefs therein, and that he is running the serious risk of losing his vessel by going that way. But he wishes to observe what he may of the country at that point from the deck of his vessel, and so, while he has the open sea for a safe route, he unnecessarily, and to gratify a whim, attempts the inner passage and meets the fate which he had good reason to anticipate. Is the insurer in such a case liable? Is not the answer necessarily, no?

Independently of authority, we know that in these marine insurance contracts the law demands the utmost good faith, and a failure in this regard defeats the right of recovery. "Good faith," says McArthur (p. 15), "lies at the root and permeates every branch of a legitimate contract."

V.

And what more marked breach of this good faith which the law insists upon can there be than to unnecessarily, or because of some purely selfish purpose, put an insured vessel and cargo up against a known, or reasonably to be apprehended, peril? The insurer undertakes to make good all losses resulting from sea perils, but not to reimburse the insured for losses caused by an intentionally reckless disregard of those precautions which common prudence dictates, and which he, understanding

the necessity therefor, wilfully refuses to take. And that is precisely what we have in the case at bar.

The owners of the "Sudden" dispatched her from San Francisco for Nome at a time when ice was to be met in the Behring Sea. The vessel was not sheathed or otherwise specially prepared for the ice, and her unfitness for that kind of navigation is evidenced by the fact that her first contact with ice put a hole through her bow. That she was not equipped for that character of work was substantially testified to by Captain Simmie, a witness for defendant in error (Trans., p. 284). The insured, of course, knew what was to be anticipated on that voyage, and without any direction, or precaution taken, likely to minimize the known risk, and the Captain, with his eyes wide open and the dangers apparent, deliberately put her into the ice and against the peril which resulted in the injury which is the basis of the claim now made against plaintiff in error. To have avoided the risks thus taken was a simple matter. The vessel could have put into Dutch Harbor, just out of Umilak Pass, until the Behring Sea was free from ice, a matter, we understand, of possibly a week or two. But the insured wanted to get to Nome "to market" the insured cargo, and so the vessel was headed into the ice and against her fate. If she did not get through the goods could not be sold at a profit, and so it was a good gamble to put her into the ice and take the chances. If she got through the goods could be sold at a profit; if she failed in the attempt, but without injury to the vessel, the goods were still on hand at what they were worth, and if she failed and sunk because of injury while in

and from the ice the insurers were in the gap for the loss.

The question at issue upon this point is not a wholly new one. There are a number of cases bearing upon it.

In *Williams* vs. *New England Ins. Co.*, 3 Cliff. 251; 29 Fed. Cas. No. 17, 731, the owners of an insured vessel attempted to put her across the bar at Hatteras Inlet. As in the case at bar, a proper purpose dictated the attempt. She struck on the bar and was wrecked. It was understood that the depth of water upon the bar was such as to make the attempted passage dangerous. It was held, that under the circumstances the loss was not within the protection of the policy. Speaking to the point we have now under discussion, the Court said:

"Authorities to prove that persons insured cannot recover for a loss occasioned by their own wrongful acts are hardly necessary, as the proposition involves an elementary principle of universal application. Losses may be recovered by the insured, though remotely occasioned by the negligence or misconduct of the master or crew, if proximately caused by the perils insured against, because such mistakes and negligence are incident to navigation and constitute a part of the perils which those who engage in such adventures are obliged to incur, but it was never supposed that the insured could recover indemnity for a loss occasioned by his own wrongful act, or by that of any agent for whose conduct he was responsible."

In support of the foregoing the Court cites:

Thompson vs. *Hopper*, 6 El. & Bl. 944;
Marsh, Ins., 376;
American Ins. Co. vs. *Ogden*, 21 Wend. 305;
Bell vs. *Carstairs*, 14 East. 374;
Cleveland vs. *Union Ins. Co.*, 8 Mass. 308.

In *Chandler* vs. *Worcester Mut. F. Ins. Co.*, 3 Cush. 328, the Supreme Court of Massachusetts, in an opinion written by Chief Justice Shaw, it is held, in line with the views expressed by Judge Clifford, that the misconduct of insured which will bar his recovery need not, as ruled by the Circuit Judge in this case, "be with the corrupt design of destroying the property"; and by way of illustration he puts this case:

"Suppose the insured in his own house sees the burning coals in the fireplace roll down on to the wooden floor, and does not brush them up, this would be a mere non feasance. It would not prove any intent to burn the building, but it would show a culpable recklessness and indifference to the rights of others. Suppose the premises insured should take fire, and the flames begin to kindle in a small spot, which a cup of water would put out, and the insured has the water at hand but neglects to put it on. This is mere non feasance; yet no one would doubt that it is *culpable* negligence, in violation of the maxim, *sic utere tuo et alienum non laedas.*"

And the general rule is that the insured is not indemnified against his own act, or want of action.

Parsons, Ins., Vol. I., p. 532 *et seq.*

And so the rule is stated by ~~Emerson~~, cited by Mr. Parsons in support of his text.

"It is, then, certain," says that learned author, "that the insurers never answer for damages and losses which happen directly through the act or fault of the assured himself. It would be, in fact, intolerable that the assured should be indemnified by others for a loss of which he is the author. This rule is grounded upon first principles."

The principle of the common law, adds Mr. Parsons, in a note to the text, citing *Chandler* vs. *Ins. Co.*, *supra*,

(p. 532), seems to be the same. And to the same effect is the decision in

Am. Ins. Co. vs. *Ogden*, 20 Wend. 287.

And so it is ruled in England.

Thompson vs. *Hopper*, 7 Ellis & B. 937.

"The underwriter is not liable," says Mr. Phillips, (Sec. 1046), "to indemnify the assured for losses by the perils insured against directly incurred through the fraud or gross misconduct of the assured. A contract for indemnity in such case would be absurd, and so far as it related to a voluntary and intended loss, void at law."

The theory of counsel for defendant in error, upon which the Circuit Judge based his ruling, rests upon the general rule that the insurer is not exonerated from liability for a loss resulting from negligence because so brought about. But we respectfully submit that the learned counsel and the learned Circuit Judge have both overlooked the cases in which there has been mere negligence, or negligence pure and simple, which, under the decisions, is the remote cause of the loss, and the wilful and intentional omission to take a usual, ordinary and proper precaution, with a full understanding of the risk incurred by such failure so to do, which falling short of a corrupt design to destroy the property is, nevertheless, something more than mere negligence, and which, under all the authorities, bars the right of recovery upon the part of the insured. This distinction is noted by Mr. Phillips, who, stating the general rule and the qualification thereof, says:

"The underwriter is liable for losses by the perils insured against, though in consequence of the negligence

of the insured, *if it does not amount to gross negligence or wilful misconduct.*"

1 Phillips, Sec. 1046, a.

In the policy in suit the plaintiff in error insured defendant in error against "barratry of the master and mariners" (Trans., p. 19), and the effect of this special warranty is to exclude liability for such negligence upon the master's part as we have under consideration in this case.

Grim vs. *Phœnix Ins. Co.*, 13 Johns. 451, 458.

The doctrine of this case is approved by Mr. Parsons.

Parsons, Ins., Vol. I., p. 534 and note.

Section 2629 of the Civil Code of this State, which by an express stipulation of the policy is made a part of the contract between the parties (Trans., p. 22), is a statutory embodiment of the rule as we have stated it. That section in terms provides, that while an insurer is not exonerated by negligence upon the part of the insured or his agents, it "*is not liable for a loss caused by the wilful act of the insured.*" It is not questioned that this section of the Code is controlling, but it is, we believe, claimed that "the wilful act of the insured" referred to must include a "corrupt design" upon the part of the insured to destroy the property. And the rulings of the Circuit Court are based upon that theory.

Upon the other hand, we contend that the section is nothing more than the statutory expression of the law as laid down in the text-books and decisions to which we have referred.

In the absence of a clear intention to the contrary, and there being no inconsistency between the terms of the statute and the rule as given to us in the decisions, it would seem that no reason arises to hold that the statute means anything else. And in addition to this, the grammatical sense of the section leads to the same conclusion. If the lawmakers had intended to make the forfeiture of the policy depend upon an intention to destroy the property, would they not have said so? The natural way to express that idea would have been to phrase the section, "the insurer is not liable for a loss intentionally caused by the insured," or something equivalent to that. Why have left the intention in doubt, and why have clothed the legislative intention in language which, seemingly, does not mean the thing intended? A wilful act upon the part of the insured does not necessarily include a criminal intent. In the present case the insured of its own motion, and intending so to do, sent the vessel into the ice, and the loss resulted from its so doing. This was unquestionably a loss resulting from "the wilful act of the insured."

Nor was there any necessity at all for the provision, if what counsel for defendant in error contends for was intended, for, of course, the insurer would not be liable for a loss resulting from the intentional destruction by the insured of the insured property. Under no circumstances would such a loss be one from a peril of the sea. The apparent intention of the statute is to relieve the insurer from a loss by a peril of the sea brought about by an intentional assumption of the risk. Of course, such a risk can be recklessly taken, without a corrupt design

to destroy the insured property; and the statute is, in line with the common law, to cover such a case as this.

If the owner sees fit to run an unnecessary risk—to intentionally disregard the dictates of ordinary prudence—the loss ought to be his.

Of course we do not question that the insurer would be liable for a loss resulting from the remote negligence of the master, just as liability would exist if the insured himself were negligent within the meaning of the general rule. But if the act of the master from which the loss results amounts to misconduct within the qualification of that rule, it is the proximate cause of the loss, and the insurer cannot be held liable.

The answer in this case is drawn upon the theory that the negligence complained of was of that character which the authorities hold to be the *proximate*, as distinguished from that which is the remote, cause of the loss; and the evidence, we contend, abundantly established this claim, and if we are right in this, a verdict should have been directed in our favor.

V.

ERRORS IN THE GIVING OF INSTRUCTIONS.

(a) What was said under the last subdivision of this argument substantially covers our complaints in relation to the instructions which were given and those which were refused, concerning the voluntary risks taken by the insured in putting the vessel and her cargo into the ice. There is this, however, to be added. It is our contention that upon the evidence on this point a verdict

should have been directed for plaintiff in error. But it may be that the Court will be of the opinion that, upon the whole case, the question was one of fact for the jury. If the Court shall be of this opinion, and hold with us as to the law in such cases, then the question should have been submitted to the jury under proper instructions. In this view of the case the Court erred in giving Instruction 14 (Trans., p. 332), already referred to, and in refusing to give requested Instructions 38 and 39. These last two requests were as follows (Trans., p. 326):

"38. An insurer is not exonerated by the negligence of the insured, or of his agents, or others, but an insurer is not liable for the wilful act of the insured.

"If, from the evidence, you find that the plaintiff, as owner of the 'Catherine Sudden,' dispatched her upon the voyage to Nome, intending and with the understanding that she should sail into the Behring Sea without regard to the presence of ice therein, and that by reason of her construction and condition she was not fit to go into that sea and into the ice therein, and was likely to meet with the accident which in fact befell her, then, and in that case, your verdict must be for the defendant."

"39. In the navigation of the 'Catherine Sudden' from San Francisco to Nome the captain of said vessel was the agent and representative of the plaintiff, and if he put his vessel into the ice knowing that she was not fit to go into the ice and was likely to meet with the accident which in fact befell her, plaintiff is responsible for what he did, and if you find, as already stated, that the master under these circumstances put the vessel into the ice when he should not have done so, then, and in that case your verdict must be for the defendant."

We submit that upon the foregoing reasoning, and upon the authorities cited, each of the foregoing instructions should have been given.

(b) In its third instruction (Trans., p. 328), the Court charged the jury that the measure of damage for which plaintiff in error was liable for loss upon the lighterage plant was such proportion of the towage charge as the insurance ($3,000) was to the valuation ($3,000), to wit, the whole amount paid. We have in an earlier portion of this brief argued the fallacy of this view, and submit our objection to the instruction upon that argument.

(c) In the fourth instruction given the jury were told that the salvors' *claim* to the whole cargo had the legal effect to deprive the insured of the cargo permanently, *i. e.*, to made the loss total. We have heretofore herein referred the Court to the authorities to the contrary, including the *De Matos* case (L. R. 7 C. P. 570), in which it is said that this is absurd. The effect of this ruling was to take from the consideration of the jury the failure of the insured, its servants and agents, to comply with the sue and labor clause, and to take the case outside the authorities cited in our main argument, in which it is held that the loss, under such circumstances as we have here, was not from a sea peril, but was the result solely of the unauthorized sale. We rest our objection and exception to this instruction upon the argument under subdivision I hereof.

(d) The fifth instruction given (Trans., p. 329) is in line with the fourth, and goes a bowshot beyond. In this instruction a number of facts are assumed which have no shadow of support in the record, and from and upon these assumed facts certain legal deductions are drawn and based, which, we submit, have even less sup-

port in the law. It is assumed as a fact that the captain of the revenue cutter then at Nome was recognized as an authority to determine the question of salvage, that he acted as an arbitrator between the insured and the salvors, and as such gave the ship and cargo to the salvors, and from these imaginary facts it is held that the loss became, in law, a total loss for which plaintiff in error was liable, unless an adjustment as between the insured and the salvors was possible. Now, there is no evidence that the captain of the revenue cutter was recognized as an authority to determine the question of salvage, none that he acted as an arbitrator, and none that he gave, or assumed to give, the ship or cargo to the salvors. If there is any such testimony, counsel for defendant in error will doubtless be able to point it out. And, of course, if the assumed base upon which the legal theory of that instruction was built has, in fact, no existence, there is nothing for the theory to rest upon. The truth is that this instruction only puts in another form the wholly unsound view of the trial judge, that an unlawful seizure and sale by salvors is a peril of the sea.

(e) The seventh instruction given will be discussed in connection with certain instructions requested by plaintiff in error which were refused. Instructions eight to eleven are, we think, unsound in principle and unwarranted by the evidence, but they are in relation to a comparatively unimportant matter, and hence we pass them.

(f) Instructions twelve and thirteen have relation to the question of seaworthiness, and our exceptions thereto should be sustained upon the ground that, taken in con-

nection with instruction fourteen, they failed to submit properly our defense based upon the affirmative averment that the vessel was unseaworthy. This defense was specially pleaded (Trans., p. 34), and there was proof to sustain it. But the Court, apparently overlooking all this in instructions twelve, thirteen and fourteen, confused this distinct defense with the entirely separate one based upon the intentional assumption of risk in putting the vessel into the ice. Plaintiff in error had the right to a submission of the question of seaworthiness in such form that the jury could have passed on it intelligently.

VI.

ERRORS OF THE COURT IN REFUSING INSTRUCTIONS REQUESTED BY PLAINTIFF IN ERROR.

(a) We claim that the Court should have directed a verdict in our favor both as to the cargo and as to the lighterage plant, and these claims were embodied in requested instructions one to three. The refusal to give these we assign as error. The argument upon which this assignment of error is based is set forth at length in the earlier portion of this brief.

(b) Requested instructions four to eight (all of which were refused) were based upon our argument having relation to the lighterage plant. In and by these requests the Court was asked to charge the jury that, for the purpose of determining the proportion of the charge for towing the launch and lighters to Nome, the actual, and not the policy, valuation was to control. Our argu-

ment and the authorities upon this proposition are before the Court, and need not be repeated. In the eighth request the Court was asked to charge, that if the launch and lighters were, in fact, not in any danger of being lost, plaintiff in error was not liable for any portion of the towage cost, and as with the other requests mentioned, our argument and the supporting authorities are before the Court. We submit that it was plain error to take this question away from the jury.

(c) In the requests nine and ten we asked the Court to charge, that unless defendant in error had proven a total loss, it could not recover; that defendant in error was bound to prove a total loss, or fail. (Requests 9 and 10, Trans., pp. 313-314). These instructions, we submit, should have been given. The policy expressly provides against anything less than a total loss under the circumstances existing in this case, and such was the theory upon which the complaint was drawn.

(d) Requested instruction eleven (Trans., p. 314) should, we submit, have been given. It was to the effect that the sale at Nome could not be taken as a total loss, unless it was, in fact, the result of actual necessity, and could not have been avoided by any effort, or efforts, upon the part of the insured, and that the necessity for the sale was not established by proof that the salvors claimed the whole property as salvors, or insisted upon its sale. Plaintiff in error certainly had the right to this instruction.

De Matos vs. *Saunders*, L. R. 7 C. P. 570;
Paddock vs. *Com. Ins. Co.*, 84 Mass. 93.

The phrase "perils of the sea" in a policy of marine insurance extends only to cover losses really caused by sea damage or the violence ot the elements.

Murray vs. *N. S. Mar. Ins. Co.*, 10 N. S. R. 24.

This case and those next hereinafter cited are also in point in support of our argument under subdivision I of this brief that the sale at Nome under the claim of the salvors was not a loss from a peril of the sea.

And substantially to the same effect are:

Mercantile S. S. Co. vs. *Tyser*, 7 Q. B. Div. 73;
Scottish Marine Ins. Co. vs. *Turner*, 1 Macq. H. L. 334;
Moody vs. *Jones*, 4 B. & C. 394;
Moss vs. *Smith*, 9 C. B. 94;
Philpott vs. *Swan*, 11 C. B. (N. S.) 270;
Meyer vs. *Ralli*, 1 C. P. Div. 358.

Requested instruction twenty-one asked the Court to charge that the burden of proof was upon defendant in error to show that the sale at Nome was necessary. This request was also refused, and we assign this ruling as error.

(e) Requested instruction fourteen should, we submit, have been given. In that request we asked the Court to tell the jury that in determining whether or not the loss was total, they could not take into consideration the value of the salvage service, for the reason that such service had not at any time been fixed either by the parties or by any court, and that the value of such survice was not an issue in the case and could not be

collaterally determined therein. We submit that the instruction was proper, under the contentions of the parties and under the circumstances developed, and that the refusal to give it was error.

(f) Requests fifteen to twenty and twenty-one to twenty-three, inclusive (Trans., pp. 316–321), were based upon our argument having relation to the duties of the insured under the sue and labor clause, which, of course, it is unnecessary here to repeat, and should, we think, have been given. Under given instruction six (Trans., p. 330) the Court recognized the theoretical correctness of our contention in this regard, but that portion of the Court's charge is simply a colorless generality, and is not a fair substitute for the refused requests.

(g) Requested instruction twenty-four (Trans., p. 320) was expressive of the law and directly applicable to the facts in this case, and its refusal was most prejudical. Given instruction seven (Trans., p. 330), which purported to deal with the subject matter of refused request twenty-four, in effect, smothered and confused it. The Court in the instruction given does not say that Morine was without authority to appoint Humphrey, or that Humphrey, as substituted agent for the insured, was not obligated to do anything to lessen the loss to the authorities, but it certainly in effect conveys that impression. The law upon the contrary is, we submit, as expressed in the refused request.

Terre Haute, etc., R. B. Co. vs. *McMurray*, 98 Ind., 358; 49 Am. Rep., 752.

8 *Wait's A. & D.*, 50.

(h) Requests twenty-five to thirty (Trans., pp. 321–323) bore upon propositions already discussed, and were, we submit, expressive of the law as evidenced by the authorities already referred to.

(i) We ask the attention of the Court to requests thirty-one to thirty-four inclusive. In these we asked the Court to instruct the jury as to the effect of what Mr. Gollin did at the time of the sale, and we submit that the Court should have charged as requested, and that its failure to do so was, in its probable effect, most prejudicial.

(j) Requested instructions thirty-five, thirty-six and thirty-seven (Trans., pp. 325–326) are based upon the defense that the vessel was not seaworthy, and upon the evidence supporting that defense. Requests thirty-eight and thirty-nine (Trans., p. 326) have relation to the voluntary assumption of an unnecessary risk by putting the vessel into the ice. The Court confusing, as we read the charge given, these two distinct propositions, refused all our requests and gave its instruction No. 13 (Trans., p. 332). We urge the refusals and the giving of No. 13 as error. It was the right of plaintiff in error to have these two matters separately stated, and the mixing up the question of seaworthiness with the other one growing out of the voluntary putting of the vessel into the ice necessarily confused the jury. That the vessel was not fit to be navigated through the ice, and hence was unseaworthy, was one defence; that in putting her in the ice, knowing the risk run, and voluntarily assuming such risk, was another and independent de-

fence. The giving of No. 13 was, in effect, a withdrawal from the jury of the question of seaworthiness.

(k) There was evidence that the sale at Nome, which, it was claimed, had made the loss a total loss, had been judicially set aside (Trans. p. 253 and 121-2), and in our requests forty-one (Trans., p. 327) we asked the Court to charge that if this was so, then, as to the sold goods, there was no loss within the protection of the policy. This instruction with the others was refused. Should it not have been given? If that sale was judicially set aside, then there was no sale. In what way, then, was there a loss from a sea peril?

(l) The final instruction requested and refused had relation to a ruling made during the trial, and upon which we have assigned error. This ruling and the subsequent refusal to charge as requested in relation thereto will be discussed in the next subdivision of our argument.

VII.

THE COURT ERRED IN OVERRULING OBJECTIONS TO QUESTIONS ASKED THE WITNESS DAVIS, AND REFUSING TO STRIKE OUT PORTIONS OF HIS TESTIMONY.

Of the total insurance underwritten by the plaintiff in error in favor of defendant in error and others insured, owners of cargo upon the "Catherine Sudden," the greater portion was reinsured. The total original insurance was $13,000, but of this amount $12,000 was reinsured (Trans., p. 64). Plaintiff in error had only, there-

fore, $1000 dependent upon the result of this suit. The general agent of plaintiff in error at San Francisco was friendly to the claim of defendant in error, and wished to see defendant in error successful. He wished to see defendant in error get a verdict (Trans., p. 66). If Mr. Davis could have seen his way safely to pay the loss, he would have done so. But the reinsuring companies were of the opinion that the loss ought not to be paid, and with them plaintiff in error united in denying liability and in defending against the suit of which the writ of error herein is the outcome.

The record being as above stated, H. E. Pennell, the secretary of the defendant in error was asked:

"Did you have any conversations with Mr. Davis, the manager of this company, concerning the payment of the loss and the amount?" (Trans., p. 150.)

To that question the witness replied:

"I did; yes, sir." (Trans., p. 150.)

The witness continuing testified:

"I had those conversations with Mr. Davis from time to time in the way I have stated, telling him of the loss and asking him as to the mode of collecting under the policy, and as the different information was furnished and considered by Mr. Davis I continued, of course, on behalf of the company, to demand our insurance money. In response to this demand I was informed by Mr. Davis that he considered the demand of my company just, and that in all fairness we should receive our money under the policy. Then I asked him why he did not pay it. He said that he would like to pay it, and would pay it, if it were not for the fact that he had reinsured a certain amount of the risk that he carried, and if he paid the amount of our policy he would have in some way to get it from the reinsurers, for they had given him to understand that if he

paid it they would not pay him; and he said that he did not want to be out his money, as he would have to be, until he would, perhaps, have to sue his reinsurers to get his money, and while he felt that we should have it justly, for this reason he could not pay it." (Trans., p. 151.)

The question itself was unobjectionable by reason of the averment of the complaint that prior to the commencement of the action the loss had been adjusted (Trans., pp. 6, 13, 16). And, of course, plaintiff in error could not anticipate that under the safeguard of a legimate question there would be smuggled into the record the recital of Mr. Davis' individual opinions concerning the merits of the litigation, found in that portion of the answer commencing with the words "In response to this demand" &c., the necessarily injurious character of which is apparent. Our motion to strike out this matter was promptly made. The learned Circuit Judge expressed doubt as to the propriety of allowing Mr. Davis' opinions concerning the liabiliiy of his company to remain in the record, but because, apparently, of our insistence upon a ruling, a thing to which no proper exception can be taken, denied the motion to strike out.

At the close of the trial we requested an instruction (No. 42, Trans., p. 327) that the statement by Mr. Davis "that in his opinion the defendant was liable" &c. should be disregarded, but this request was refused. Of course, the letting of this statement of Mr. Davis remain in the record was to give the jury to understand that the opinion thus expressed was something that could be considered in reaching their verdict.

It would seem that argument upon these rulings would be but a useless waste of the time of this Court. We leave it to the ingenuity of counsel upon the other side to suggest some possible support therefor.

VIII.

A companion ruling to the one last considered is set forth in our fifty-ninth specification of error herein (ante, p. 36). The argumentative answer of Mr. Davis, to which our motion to strike out, as therein set forth, was addressed, was upon its face intended to aid defendant in error, and it can hardly be doubted that it had that effect.

IX.

The Court permitted counsel for defendant in error, over our objection, to ask the witness Davis whether or not, in stating to the representatives of defendant in error that the proofs of loss presented by the latter were sufficient, the fact that it had been stated that Mr. Gollin had consented to the sale at Nome had any effect on his judgment. It is difficult to perceive the connection between these two things, but by the ruling of the Court in permitting the witness to answer, as he did: "Yes, sir, for the reason that I have known Mr. Gollin ever since I have been in the insurance business, and I have great faith in his ability," the jury were, in effect, told that this was material, and it is fair to presume that, having been given to so understand, they gave Mr. Davis' high opinion of Mr. Gollin due consideration in reaching their verdict.

Throughout the foregoing argument we have proceeded upon the theory that defendant in error, as to any item upon which a total loss had not been proven, could not, as to such item, recover. The warranty of the policy bearing upon this is as follows (Trans., p. 20):

"3. All merchandise not excepted under the following memorandum clause (this clause has no bearing upon the question) is hereby warranted by the insured Free From Particular Average and Partial Loss, unless occasioned by stranding, sinking, fire, collision, or other extraordinary peril hereby insured against, and amounting to fifty per cent. or more on the sound value of the whole shipment at the port of delivery, and all such loss shall be settled on the principles of salvage loss, with benefit of salvage to the insurers."

Under this warranty it will be seen that, under a properly framed pleading, and upon sufficient proof, a loss less than total, if of a kind and from a cause insured against and over fifty per cent., would be within the protection of the policy. But the complaint, as to each class of property covered, alleges only a total loss, and there is no proof of any loss less than total; and hence, unless, in law, the loss to defendant in error was, under the circumstances, a total loss, there is no evidence upon which a recovery for any lesser sum could have been maintained In other words, there is no evidence upon which the jury could have measured the amount of a loss less than total. This is unquestionably true as to the merchandise item, and it is not pretended that the lighterage plant was, by reason of the "Sudden's" contact with the ice, injured at all; and the Court expressly so charged, saying (Trans., p. 328):

"3. It does not appear that any injury or damage resulted to the lighterage plant from the accident to the 'Catherine Sudden,' or that the plaintiff suffered any loss or damage as to said plant within the protection of the policy, except in so far as plaintiff was compelled to pay salvage for the towing of said lighterage plant from the place of the accident to Nome."

Our contention then as to the lighterage plant, that we were liable only for a total loss, is based upon the theory sustained and accepted by the Court that there was not, as to that portion of the insured property, by reason of what happened to the "Sudden" in the ice, any possibility of loss from any of the specified causes under which plaintiff in error was to be liable for a partial loss above fifty per cent. And if this be so it follows that there was not under the policy any partial loss liability and hence the authorities cited by us upon this branch of the case are in point.

Upon the whole case we respectfully submit that the judgment should be reversed.

VAN NESS & REDMAN,
Attorneys for Plaintiff in Error.

No. 979

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND, (a Corporation),

Plaintiff in Error,

vs.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

Upon Petition of Defendant in Error for Rehearing.

VAN NESS & REDMAN, and
T. C. NAN NESS,
Attorneys for Plaintiff in Error.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

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THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND, (a Corporation),

Plaintiff in Error,

vs.

NOME BEACH LIGHTERAGE AND TRANSPORTATION COMPANY (a Corporation),

Defendant in Error.

No. 979

BRIEF FOR PLAINTIFF IN ERROR.

UPON PETITION OF DEFENDANT IN ERROR FOR REHEARING.

In brief response to the argument of petitioner upon application for rehearing, leave having been granted us to reply thereto, we submit the following:

I.

1. BARRATRY: The policy sued on covered against perils of the sea, pirates, assailing thieves, jettisons, barratry of the master, or mariners, etc. (Trans., page 19.)

Under this policy it was open to defendant-in-error to sue for a loss by a peril of the sea, or, alleging misconduct on the part of the master of the "Sudden," to have counted upon a barratrous loss. The election was made, and, upon the theory that the master was authorized to proceed as he did, the action was based upon a loss by a peril of the sea. And having made this election defendant-in-error may not be permitted to recover as for a loss by barratry. Barratry is not a peril of the sea, nor can a recovery be had for such a loss under such a complaint as we have in this case, nor without appropriate averment of the facts upon which barratry is claimed. In the absence of such averment there can be no recovery for a loss so caused.

2 *Phillips' Ins.*, 610.

Blyth vs. *Shepard*, 9 Mees & W. Exch., 768.

The complaint in this case was framed, as we have said, upon the theory that the loss was from a peril of the sea. There was no averment, nor any claim, either in the putting in of the proof, or in the instructions requested, and, or, given, that the loss was barratrous. Upon the contrary the position of the defendant-in-error and its counsel throughout, both in the Circuit Court and in the briefs in this Court, was, that the master of the "Sudden" did, under the circumstances, just what he should have done. And the Court (at the request of defendant-in-error) instructed that the loss was from a peril of the sea. (Trans., p. 329.) Defendant-in-error will not be permitted to plead and try its case upon one theory and, having a decision against it upon that theory, secure a rehearing and a retrial upon another, different, and inconsistent position.

2. The *Civil Code* (Sec. 2629) expressly provides that an insurer is not liable for a loss caused by a willful act

of the insured, and this case is within the protection of that section. The insured, defendant-in-error herein, was the owner of the vessel, and of the insured cargo, and the captain, whose willful running of the ship against a patent danger brought about the loss, was its agent, and his act, as is correctly held in the decision against which this rehearing is asked, was the act of the insured, and for which the insured is responsible. Of course if the captain had sailed the vessel into the ice *against* the express orders, or understood wishes, of the insured, his act, under such circumstances, might be held to be barratrous. But such is not the case. The vessel was dispatched to Nome by the insured at a time when it was necessarily a matter of common knowledge that there was floating ice in the Behring Sea, and as the agent of the insured, and with its consent, he was crowding his ship to her destination to get for his principal the benefit of the early market. The loss, therefore, was not barratrous, and this Court, under these circumstances, correctly held that in putting the vessel into the ice the master was the representative of the insured and the act itself was the act of the insured.

"If" the act complained of "be done in compliance with the owner's instructions or request, or with his assent, it is not barratrous."

1 *Parson's Mar. Ins.*, 567

"If the owners, or quasi owners, are themselves in default, in not preventing an act which would be barratrous, this is equivalent to their assent."

Id., 571

It is admitted by counsel for defendant-in-error that his client left to the judgment of the master the manner of proceeding. (Brief of defendant-in-error in reply to

original brief of plaintiff-in-error, p. 61.) It was left to the discretion of the master, says the counsel, whether the vessel should or should not be put into the ice. And therefore, we submit, it follows, that in going into the ice the master was acting under the authority of the insured, and hence was not, as to the latter, guilty of any wrongdoing upon which a charge of barratry could be based. His act, under the circumstances, was the act of the insured and hence clearly, in no view of the law, barratrous. (*Parsons,* ante.)

To be barratrous the act complained of must be in disregard of some duty to the owner. Anything done with his consent, express or implied, is not barratrous.

1 Abbot's Law Dict., "Barratry," p. 128.

The decision of the Court proceeds upon the theory that, in putting the vessel into the ice, the master was the representative of the insured and the authorities, as we have seen, fully sustain the conclusion announced.

II.

The point made by petitioner under this subdivision was fully discussed in the briefs, and calls, we think, for no further discussion. It is, in fact, without any merit whatever.

III.

As to the new point suggested under this subdivision of the petition we have only to say: *First,* that neither upon the trial, nor in the briefs, was there any hint thereof; and *next,* that there never has been, as to the point upon which our bill of exceptions was taken and our writ of error prosecuted, no claim upon the part of plaintiff-in-error that "by default of insured . . . the insurer never incurred any liability under the policy." We did, in the Court below, base one of our de-

fenses upon the proposition that the "Catherine Sudden" was unseaworthy, and that hence, *as to that defense,* liability under the policy never attached. But the verdict upon that point was against us, and as the testimony upon behalf of defendant-in-error was sufficient to support the verdict in that particular we have not, as to that contention, at any time challenged the judgment. Upon our exceptions, based upon the contentions urged in this Court, we have necessarily conceded that original liability did attach under the policy. Our claim has at all times been that, as to these defenses, the loss was not, as to the going into the ice, within the protection of the policy, and that as to the fraudulent sale at Nome we were released from liability because of the wrongful acts of the defendant-in-error in connection therewith.

IV.

Concerning what is said under this subdivision, we unite with counsel in the hope that the Court will appreciate and understand the diffidence and spirit of frankness and candor in which he makes it. But we also confidently anticipate that the Court will not by reason thereof be misled into giving any consideration to the suggestion itself. Of course, we could offset what counsel says with an adverse counter-statement equally frank and candid touching the frauds perpetrated at Nome to which counsel refers. It occurs to us, however, that as the judgment of reversal is upon grounds wholly distinct and unconnected with those frauds, it is not necessary to burden the Court with any argument in relation thereto.

We respectfully submit that the petition for rehearing should be denied.

VAN NESS & REDMAN, and
T. C. VAN NESS,
Attorneys for Plaintiff-in-Error.

No. 979.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND (a corporation),

Plaintiff in Error,

vs.

NOME BEACH LIGHTERAGE & TRANSPORTATION COMPANY (a corporation),

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

NATHAN H. FRANK,
Attorney for Defendant in Error.

No. 979.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

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THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND (a corporation),

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Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

We find some embarrassment in approaching this argument because of some manifest errors into which appellant has fallen respecting the facts. Any attempt at a categorical reply to them would tend to throw us out of all logical discussion of our subject, and we desire accordingly

to note at the outset that, though we may not in the course of our reply controvert all of what we think are his assumptions of fact, we do not wish on that account to be deemed to assent to them. We also feel that many of the facts upon which appellant dwells are not essential to any proper considerations of the questions of law raised by the appeal, and their presence seems to us inexplicable except upon the theory that they are intended, indirectly, to create suspicion in the mind of the court that the appellee is attempting to foist a corrupt claim upon an insurance company. Indeed, in the latter part of his brief, the intent is unveiled. To that attack it is sufficient reply to say that it is the usual cry which characterizes a bad case and is without foundation in fact. Neither the trial judge nor the jury seem to have been at all impressed with the attempt made in that direction in the lower court, and we feel satisfied that when this court has examined the record it will come to the same conclusion.

The facts of the case as we take them from the record are as follows:

In May, 1900, the appellant issued to the respondent its policy of insurance, covering certain merchandise laden on the barkentine "Catherine Sudden", for a voyage from the port of San Francisco to Nome, Alaska, "*at "ship's tackle or thirty days after arrival*". The policy contained two insurances, one on merchandise under deck valued at the sum of $5,250; the other on merchandise on deck valued at $3,000. The perils insured against are "of the seas, pirates, assailing thieves, jetti-

" sons, *barratry of the master* or mariners, and all other " losses and misfortunes that have or shall come to the " hurt, damage or detriment of the said property or in- " terest to which insurers are liable by the rules and " customs of insurance in San Francisco, excepting such " losses and misfortunes as are excluded by this policy" (Tr. pp. 18-19).

None of the cargo in question consisted of memorandum articles, and therefore it was all subject to the 50 per cent average clause of the policy:—that is, it was insured "free " from particular average and partial loss *unless occa-* " *sioned* by stranding, *sinking*, fire, collision or other " extraordinary *peril hereby insured against and amount-* " *ing to 50 per cent or more* on the sound value of the whole " shipment at the port of delivery, *and all such loss shall* " *be settled on the principles of salvage loss with benefit* " *of salvage to the insurers*" (clause 3 Tr. p. 20).

It is further agreed "that the provisions of the Civil " Code of California shall be conclusive and binding as " regarding *the warranty of seaworthiness*, liability of in- " surers in case of prior, subsequent or simultaneous in- " surance, *and such other questions as are therein legis-* " *lated upon and not otherwise provided for in this policy*" (p. 22).

The usual "sue and labor" clause is also incorporated in the policy (p. 19).

Under this policy there was laden on board said vessel *under deck* a miscellaneous cargo of provisions and groceries and 150 tons of coal (p. 128). The cargo is itemized on pages 141, 142 and 143 of the record, being that portion

of the cargo on the ship's manifest consigned to the "Nome Beach Lighterage & Trans. Co." *On deck* there was shipped three lighters and gear, the steamer "Dorothy" and six thousand feet of lumber. The lumber referred to is what is called a "knocked-down house". It is not lumber, properly speaking, but was sawed, fitted and ready to put together into a house. *None of it was merchantable lumber that would find a market* (pp. 145, 146).

The rest of the cargo named in the manifest *and which was the bulk of the ship's cargo* belonged to other consignees *and had nothing to do with this insurance.*

The vessel started upon her voyage on the 28th day of April, 1900, and proceeded without event until about the 30th day of May, when the vessel encountered large fields of drift ice. The master, exercising his discretion, sailed through the ice for several days, in company with a large number of other vessels, both sail and steam, (about thirty in number) all bound for the same place (p. 54). The ice appeared at first in fields of broken pieces and finally in large fields with passage ways through them, these passage ways changing as the ice moved. On about the third day, and while under sail, making headway through one of these open passages, the vessel struck a submerged cake of ice and stove a hole into her bow (pp. 54, 263-4-5). She was then run upon a cake of ice with a view of preventing her sinking, but she filled with water and went down so that but a very small portion of her upper deck remained above water. About 90 per cent of her was under water (p. 54). The passengers and

crew were compelled to abandon her, some going upon the ice and others on board of other vessels that came to their rescue. While in this condition, two sailing vessels, the "Rube Richardson" and "Pitcairn" came alongside and offered their services, and the master of the "Sudden" permitted them to take on board some flour and lard (p. 265) or flour and bread (p. 49) *which would otherwise have been lost and ruined* (p. 272), with the understanding that they would take it to Nome, and whatever salvage was due thereon should be there settled. About the third day after the sinking of the "Sudden" a steamer known as the "Corwin", equipped with pumps and appliances, came alongside. She drew the steam launch "Dorothy" and two barges off of the deck into the water, and subsequently under a salvage contract entered into with the master, towed this steam launch and barges to their destination. By that contract the master of the "Sudden" agreed to pay for salving the launch and barges the sum of $2500.00 in cash and to give the service of the crew and lighterage equipment to land the cargo of the steamer "Corwin" at Nome. He further agreed that the salvors should retain possession of the launch, barges and surf boats until final payment of the said salvage money. (The contract is set forth on pp. 223 and 224 of the record.)

When the "Corwin" began operations, the master of neither vessel expected that they would be able to save anything except the launch and barges (p. 267), and the master of the "Sudden" was prepared to abandon her. "We did not suppose he would ever get the 'Catherine "Sudden' up, *and if he did not have all the appliances in "the world he never would;* he would not have got the

" water out of her. *He had about 50 men and all the ap-*
" *pliances*" (p. 299).

Nevertheless the "Corwin" raised the "Sudden" and cargo from their sunken condition. They succeeded in getting her into a position where they were enabled temporarily to close the hole and pump her out and float her, thus finally succeeding in towing her to Nome. They arrived at Nome on June 10, 1900, when everything was unsettled. It was the first season of the Nome excitement. Twenty or twenty-five thousand people were stranded there (p. 96), and affairs were in a chaotic condition (p. 88). There were no courts or established modes of proceeding (p. 118). "There was no Court " there, and Captain Tuttle was the Court. They called " a meeting and decided what Captain Tuttle said was " law" (p. 59). "The government in that country at that time was entirely in the hands of the revenue officers, who took the place of the courts" (p. 121). There was no such thing as a market in "Nome" (pp. 96-7), and no means of raising money (pp. 88-89). Nobody's paper passed current (p. 100), and money was very scarce. It was held at exorbitant rates, and even on those conditions could only be had as a favor (p. 89). This was the initial venture of the Nome Beach Co., plaintiff, and carried the outfit intended for the beginning of business of that company at Nome (pp. 57, 149). There was no means for providing any funds for the Company except by means of the "Sudden" (pp. 57, 149-150). By another conveyance they had sent up an agent to represent them, and provided him with $3,000 in cash (pp. 146-149). Before the arrival of the "Sud-

den" this agent was taken sick with a fatal illness and had used nearly all of his funds (pp. 57, 112). A few hundred dollars that remained was applied to a partial payment of the wages of the crew stranded upon that inhospitable shore (pp. 57, 111, 112).

There happened also to be at Nome, upon their own business, two of the stockholders of the Nome Beach Co., Theodore P. Colcord and Fred C. Howard, who, while having no authority as agents for the company, yet as stockholders felt themselves interested in its welfare. Seeking some means of aiding the company in its dilemma, these stockholders applied for aid to Captain Humphry, the agent of the Pacific Steam Whaling Co., who was a personal friend of theirs. Captain Humphry was unwilling at first to undertake the matter, saying he had no authority to use the money of the Pacific Steam Whaling Co. for such purpose, but finally upon the personal guarantee of Colcord, Howard, and some other stockholders who were there present, agreed to take hold of it for the benefit of these stockholders (pp. 110,111). He accordingly advanced the $2500 due to the Corwin Co. on account of salvage in order to get possession of the launch and barges, and drew upon the company at San Francisco for that amount, with the understanding that he should retain possession of them and have the use of them until he had worked out the $2500 (pp. 116-117). Besides this $2500, the launch and barges were, before being turned over to Captain Humphry, and in accordance with the salvage contract, used for the discharge of the "Corwin" (p. 57). The reasonable value of this service was for the lighter $400 for ten hours' work, and for the launch

$50 per round trip for each tow of the lighter. The lighters were engaged in that service one day and one night, which would amount to $800. To this is to be added the $50 a round trip for the launch (pp. 280-292). It made at least one trip every hour for 24 hours (pp. 280-81), which would make somewhere in the neighborhood of $1,200.00 for the service of the launch. This, added to $800 for the barges, and $2500 cash, amounts to about $4500 in all for the salvage of the launch and barges.

At Nome the only anchorage is the open roadstead, which is subject to visitation of sudden and violent storms, and here the vessel on her arrival at Nome was necessarily brought to anchor. She had no means of propulsion, and was liable at any time to go ashore and become a total loss (pp. 101-108, 113-120). The cargo had then been wet with salt water for about eight days (p. 119), and so far as the groceries and canned goods are concerned, were greatly damaged. One witness testified that canned goods are good for nothing after being wet with salt water unless immediately washed. That he had handled goods wet for not more than a fortnight which were completely gone (pp. 107-08). Another witness, speaking of his portion of the cargo of groceries and canned goods, says that 60 or 70 per cent of it was destroyed and the remaining 40 per cent all damaged (p. 119).

Under these circumstances a board of survey was called, and the under-deck cargo, which included many consignments other than that of the Nome Beach Co., was surveyed by a competent board of surveyors, consisting of the ship carpenter on the U. S. revenue cutter "Bear", the

President of the Chamber of Commerce of Nome, and an experienced ship-master, who, at the time of testifying, was in the employ of the San Francisco Board of Marine Underwriters as their surveyor at Nome. This board of survey condemned the cargo and ordered it sold at public auction as it lay in the ship, deeming that for the best interests of all concerned. This auction was duly advertised and was proceeding before a large concourse of people when it was interrupted by a man named Gollin, who announced himself as the agent of the San Francisco Board of Marine Underwriters (of which board this insurance company is a member), and demanded to know what the proceeding was. At Mr. Gollin's request the sale was stopped and adjourned to permit him to investigate the matter, which he did to his own satisfaction, and thereafter gave his *express consent* as agent of the San Francisco Board of Marine Underwriters, to the sale (pp. 85, 86, 87 and see Certificate, p. 198; report to Underwriters, Ex. 3, p. 77). His authority is found in Ex. 1 and 2, pp. 67, 76.

In view of the attempt to raise suspicion as to the fairness of this transaction, it might be well at this point to consider the views of this agent on that question. He says (p. 87), "I am satisfied that everything was done that "any merchant or respectable set of men could do in "order to effect this arrangement and this sale. It was "fair and square and whatever I have done, after mature "reflection I would do again. My experience as an under-"writer of thirty years in this country is such that I "never, I may say, saw a fairer claim (p. 88). After I "made my investigation I returned to the sale and allowed

" the sale to go on. I simply said to these people that " everything was fair, and I was satisfied that the action " taken was for the best interests of all concerned."

Mr. Davis, General Manager of Appellant Company, says he knew Mr. Gollin ever since he was in business—has great faith in his ability, and always knew him to be upright (p. 61-62).

Before that sale the master had made efforts to treat with the salvors, but they would not recognize him, laughed at him (pp. 59-60) and claimed the right to the entire cargo, in which claim they were supported by the only authority then at Nome, namely, Captain Tuttle, of the U. S. Revenue Cutter "Bear" (55, 59, 269, 270, 273, 275). As already suggested, there were no courts and everything was in a state of chaos. In the language of the witness, "I had no resort to do anything" (p. 270). A similar demand was made upon the masters of the "Pitcairn" and "Rube Richardson" with a similar result (pp. 272-273).

The salvors took the same position when interviewed by Capt. Humphry (pp. 112, 117, 119).

So far as the cargo here in question is concerned, the sale netted $530.00 (p. 212), which was retained by the salvors to be applied on account of their claim against the cargo for salvage services. No part of it ever came into the possession of appellees (p. 152).

After news of the loss arrived in San Francisco the company was notified and given all the information it asked for respecting the loss. The proofs of loss were satisfactory to the company (p. 60) and an abandonment was also made to them (p. 64).

The general manager of the defendant company then told the plaintiff that in his opinion the proofs that were furnished were sufficient, *and the loss should be paid,* but he could not admit full liability, or liability, on account of being stopped by his re-insurers (p. 61). That if his re-insurers would follow, he would pay the loss; that the probabilities were that if he could not collect from his re-insurers, plaintiff would have to bring suit against him (p. 65).

This general manager further testified upon cross-examination by Mr. Van Ness that we "would like to see the "loss paid, and if you want an addition to that, *I think it* "*ought to be paid*" (p. 66).

The defense, which was nominally made in the name of the Standard Marine Insurance Company, is, in fact, made by the re-insurers, who are not parties to the suit, and with whom the plaintiff has no relation, contractual or otherwise, and to whom it owes no duties (p. 64).

The foregoing facts are principally, if not entirely, drawn from undisputed testimony in the case. But whether disputed or not, in view of the verdict (being in evidence) they must, for the purpose of this appeal, be treated as facts. The determination of questions of fact depending on conflicting testimony was for the jury, and is not open for reconsideration on this appeal.

The principal issues raised by the defense were as follows:

1. Besides formal denial of many of the averments of the complaint, it is alleged that "the plaintiff "sailed the vessel into the ice knowing full well that so

" to do endangered the safety of said vessel, and that so " to do was not consistent with good seamanship, or with " due and proper care, and that the plaintiff, when ice was " encountered, in the exercise of proper care, should have " changed the course of said vessel and sought open water " or a port of safety until danger from ice between San " Francisco and Nome had passed" (p. 28).

2. The survey, condemnation and sale of the underdeck cargo is admitted and attempted to be impeached by an allegation that the goods sold were of value greatly in excess of the price at which they were sold, and that with the use of the lighterage plant it could have been landed, and that the plaintiff did not seek to arrange with the Corwin Company for the landing or delivery of the cargo to plaintiff, or to secure from them a return or the delivery of any of the insured merchandise, and did not seek to arrange with them for salvage compensation, nor did they seek by way of purchase of said insured merchandise to recover it or otherwise to reduce the loss to the plaintiff or to the defendant.

3. They put in issue the seaworthiness of the vessel for the proposed voyage. At the trial this defense of unseaworthiness was limited, it being admitted by counsel that "there is no question but what she was seaworthy " so far as open water is concerned, but whether or not " sending that vessel up with Capt. Panno, who was in " charge of her, under instructions to get into Nome at " the opening of the season, they did not knowingly send " a vessel that was incompetent to go through the ice un- " der those circumstances simply to her death, if she went " in the ice. That proposition involves a technical

" defense on the question of seaworthiness, and " his Honor will instruct you in that regard. " * * * Whatever the fact might be as to " the 'Sudden's' seaworthiness in open water or ordinary " sea, we are not claiming that she was unseaworthy in " those particulars. Our claim is that she was not a ship " fit to be put into the floating ice of Behring Sea at that " season of the year. That is all the claim that we make." (pp. 45-46.)

The errors assigned are principally with regard to instructions to the jury, there being seventeen assignments for error in ruling on questions of evidence and fifty-five with respect to instructions.

ARGUMENT.

In this argument we propose to follow appellant in the order adopted by him, but preliminary thereto we have to notice a statement of fact which appears to be the basis of his argument throughout, wherein he has committed a fatal error. He says (Brief, pp. 2 and 3):

" Touching the liability of plaintiff in error in the event " of loss, the policy provided that all merchandise not " excepted under the memorandum clause was warranted " by the insured free from particular average and partial " loss, unless occasioned by stranding, sinking, fire, col- " lision or other extraordinary peril insured against, and " amounting to *fifty per cent. or more on the sound value* " *of the whole* shipment at the port of delivery, and that " such loss should be settled on the principles of salvage

" loss with benefit of salvage to the insurer. To make " the case one in which, *in view of this warranty, a recov-* " *ery could be claimed,* defendant in error alleged an " *actual* total loss."

It will presently be seen that this idea is the basis of his argument under points I and II, pp. 38 and 44 of his brief. In this statement he is, however, in error, both with respect to the nature of the warranty and with respect to the nature of the allegation of the complaint. The insurance, by its very terms, covers a *constructive* total loss. It is *only* "free from particular average and partial loss" when the damage is less than 50 per cent. If it amounts to 50 per cent. or more, it is to be "settled *on the principles of* " *salvage loss, with benefit of salvage to the insurer.*" How can a *constructive* total loss be more accurately described?

PHILLIPS says:

> "A constructive or technical total loss is one in which some part or remnant of the subject insured is surviving, or some claim accruing from it against third persons."
>
> 2 Phil. on Ins., §1487.
>
> "The part or remnant of the subject insured, which survives the peril in a total loss, is denominated salvage."
>
> Id., §1488.

The provision of the policy, therefore, that, on a 50 per cent damage "it is to be settled on the principles of salvage " loss with benefit of salvage to the insurer", is, when expressed in the language of the above definition, a provision that, if a part or remnant of the subject insured

amounting to 50 per cent or *less* survive the peril of a total loss, it is to be settled on the principles of a loss with a part or remnant surviving, the benefit of which remnant goes to the insurer. But such a loss "in which some part " or remnant of the subject insured is surviving," is, according to Phillip, "a constructive or technical total loss".

We do not think it necessary to enlarge upon this. It is the elementary language of marine insurance.

Neither, as claimed by appellant, have we in our complaint limited our allegation to "an *actual* total loss". The complaint in every instance alleges, in general terms, "a total loss by perils insured against", the language being (p. 5 and amendment p. 39), "that the whole of said mer- " chandise was totally lost by perils of the sea and other " dangers in said policy insured against". The language in the other two counts (pp. 9, 12 and 39) is, "the said " merchandise became a total loss, etc."

These allegations admit proof of a *constructive* total loss as well as of an actual total loss.

In *Snow vs. Union Mutual Insurance Co., 119 Mass., 592*, the allegation of the loss was in the same language as here employed, viz: "Said ship and her outfits, cargo " and stores were totally lost by the perils of the seas and " perils insured against in said policy." The court there said:

> "The allegations of a total loss, like the corresponding words in the policy of insurance, covers a constructive as well as an actual total loss. Heebner vs. Eagle Insurance Co., 10 Gray, 131. It is not necessary under our practice *to allege the abandonment or other facts necessary to constitute the total loss re-*

lied on. The evidence at the trial being sufficient to prove a constructive total loss by the cause alleged in the declaration, it follows that, according to the terms of the report, there must be judgment for the plaintiff for a total loss."

This is in strict accord with the practice in the United States courts as laid down by Judge Story in *Columbia Insurance Co. vs. Catlett, 12 Wheat. 396,* where it is said that:

> "There is no averment in the declaration that any preliminary proofs of loss were offered to the Company, nor of any promise to pay in 60 days after such proofs according to the terms of the policy, *nor that any abandonment or notice* was given to the Underwriters. It was, in our judgment, wholly unnecessary to aver the latter facts. *The abandonment* and notice thereof are but matters of evidence to establish *the facts of a total loss, which is expressly averred in the declaration.*"

The total loss there referred to was necessarily a constructive total loss, for the abandonment performs no office in an *actual* total loss.

> See also *4 Joyce on Insurance, p. 3523,* and cases cited.

The question, then, to be determined is, Was there under the facts hereinbefore narrated a total loss *either* actual or constructive?

Since the question proposed by appellant confines itself to an *actual* total loss, we will first take that question up for discussion, though we do not deem it necessary for a determination of the questions of law raised by the appeal. If we be right in the foregoing proposition that a

constructive total loss is covered by the terms of this policy, appellant's argument based upon the proposition that only an actual total loss is covered, goes for naught, and the court certainly committed no error in refusing instructions based upon the legal proposition that no recovery could be had except for an actual total loss.

We are prepared, however, to meet him upon his own ground: We say, even assuming that the policy was against *actual* total loss only, under the facts of this case a recovery would be had, for those facts disclose an actual total loss.

Stating our proposition in the form adopted by appellant (point I, p. 38), we say:

I.

THE LOSS UPON THE CARGO, OTHER THAN THE LIGHTERS AND LAUNCHES WAS CAUSED BY A PERIL OF THE SEA AND WAS INSURED AGAINST, AND HENCE PLAINTIFF IN ERROR WAS LIABLE THEREFOR.

Under the negative of this heading, appellant makes the proposition that as the cargo arrived at Nome "in specie" no loss as to it "was proven except such as resulted from " the sale of the goods upon the demand of the salvors as- " sented to by the agent of the insured". This is error as a statement of fact. We understand the error to arise from the mistaken construction of the policy above referred to. That is, appellant assumes the insurance to be against "absolute total loss only" and hence, means to state that if the goods arrive "in specie" *though damaged*, there is no loss proven *within the policy*. But the

policy being, as we have already shown, an insurance against *constructive* total loss, or what is sometimes called "total loss with benefit of salvage", under its very terms *a 50 per cent damage,* with abandonment, creates a total loss within the policy, even though the goods *do* arrive "in specie".

The authorities, too, upon which he bases his argument, bear the same infirmity. They are cases arising under a "free from particular average" policy, *unlimited with respect to percentage.* There is a great difference between a policy *absolutely* "free from particular average", and one only *conditionally* "free of particular average", for in the latter case, when the condition is fulfilled, the loss is no longer "free of particular average".

In other words, it "is a condition precedent, and when that is fulfilled the warranty against particular average ceased to have operation". *London Assurance vs. Companhia, 167 U. S. 165.*

Accordingly in *La Fonciere, etc. vs. Koons, 75 F. 111-112,* this Court said:

> "It is clear that the contract of insurance in question was not limited by the provisions of clause 3 if the loss sustained by the appellees amounted to 50 per cent. or more", etc.

The case of *De Mattos vs. Saunders,* upon the authority of which Mr. Barber makes the statement quoted, was "free from average unless general, or the ship be stranded", and the ship was *not* stranded. The quotation from Barber speaks of it as "insured 'free of average' ". That author understands that "free of average unless general",

means "free of particular average" (Barber, p. 278), while the broader term "free of average" includes both general and particular average. So that, under either of the above provisions, the policy there referred to was, with respect to percentage of damage, unconditionally "free of particular average". That is, in effect, an insurance against absolute total loss only, and is defined by the Civil Code, §2711, as follows:

> "Where it has been agreed that an insurance upon a particular thing or class of things shall be free from particular average, a marine insurer is not liable for any particular average loss *not depriving the insured of the possession* at the port of destination of the *whole* of such thing, or class of things, *even though it become entirely worthless,* but he is liable for his proportion of all general average loss assessed upon the thing insured."

But, as we have already said, such was not our policy. Under its provisions a loss occurs if the assured be deprived of the possession of 50 per cent of the thing insured, instead of the *whole* of it; or if it be *damaged* 50 per cent. In other words, it is, as before demonstrated, a constructive total loss policy. See also, C. C., §2717, sub-sec. 1 and 2, and §2705.

De Mattos vs. Saunders cannot, therefore, afford a rule of decision for the case at bar.

I. An Actual Total Loss—Nevertheless, we contend that the uncontradicted evidence in this case establishes the fact within the meaning of the law, that the insured was *by a peril insured against* deprived of the possession of the *whole* of the under-deck cargo at the

port of destination, and hence has proved a loss within even a "free from particular average" policy as defined by the above provisions of the Code. We are thus, for the present argument, adopting the extreme position of the appellant.

Taking up his argument on this line, we call attention to the point he proposes. He says (p. 38), "But it is "claimed that the appropriation of the goods put on the "relieving vessels, by those vessels, and the sale of the "remainder of the cargo by the 'Corwin' to satisfy the "salvage lien of the latter, was a loss by a peril of the sea, "and within the protection of the policy. The court sus- "tained this contention and so instructed the jury. Can "this view of the law be sustained?"

This is not an accurate statement either of the claim of appellee, nor of the instructions of the court to the jury. *The court did not so instruct the jury, but* did instruct them as follows (Tr. p. 329):

"The accident to the vessel by which a hole was stove "in her bow and she was almost submerged, was a peril "of the sea from which the cargo under deck would have "been lost, but for the intervention of the salvors, who "applied themselves to the rescue. In this way the ves- "sel and cargo came rightfully into the possession of the "salvors, who thereupon and after arriving at Nome with "the vessel and cargo, claimed the whole of such cargo "under deck for salvage service, and, so claiming, perma- "nently deprived the owners of said property.

"There were no tribunals at Nome authorized to de- "termine the question of salvage, and no recognized au-

"When a vessel or other property is taken possession of by captors or salvors, of course the owner is dispossessed, at least for the time being, and, unless he can restore his possession by reasonable efforts the loss becomes absolutely total; but he is bound to use such efforts. * * * In short, if the property passes into the possession of captors or salvors, and the owners are thus in fact dispossessed, the loss becomes total, provided the owners cannot in either case recover the possession except by disproportionate exertions, expense, or hazard; otherwise it does not."

Monroe v. British & Foreign M. I. Co., 52 Fed. *789*.

" thority in that behalf other than the captain of the reve-
" nue cutter then at that place, and who, acting as arbiter
" in the matter, gave such cargo to the salvors, by whom
" it was sold, and thereby became and was a total loss to
" plaintiff within the meaning of the law, and for this loss
" the defendant is liable, *unless the plaintiff might, with*
" *reasonable effort on its part, have arranged with the*
" *salvors for an adjustment of the salvage claim and the*
" *delivery to it of the said cargo.*"

This is an accurate statement of the law and together with the 6th and 7th instructions following, left the question of fact as to whether the plaintiff might with reasonable efforts, have arranged with the salvors, to the decision of the jury.

The view of the law contained in this instruction *can be sustained.*

In his argument of this question appellant supposes what he calls "an extreme case", and which is indeed an extreme case, for it contains the unwarranted condition that the cargo bought up at auction was sold "to the per-
" son who is at the time acting as the agent of the in-
" sured" (p. 39). The record does not warrant the attempted application of any such assumed fact to the case at bar. The gist of his contention, however, appears in the following:

" Must it not be said in the case which we have sup-
" posed, and in the case at bar, that the damage suffered
" by the insured is not from a peril of the sea, but by rea-
" son of the improper and unlawful conduct of the salv-
" or? It seems to us quite clear that, in the case sup-

" posed and in the case at bar there is no legal causal con-
" nection at all between the accident and the subsequent
" loss to the insured resulting from the improper and un-
" lawful conduct of the salvor; that the latter within
" the meaning of the law, is a new, intervening and inde-
" pendent cause for which the insurer cannot be held re-
" sponsible" (Brief, p. 40).

This appears to be the foundation of the argument that the loss is not covered by the policy.

While we do not concede that the action of the salvors, under the conditions then existing, was "improper and unlawful conduct", yet even assuming it to be so, we reply:

1. That the action of the salvors was a peril of the sea within the meaning of the policy;

2. That even if it was not a peril insured against, it was nevertheless a peril to which the thing insured was exposed in the course of the rescue from a peril insured against that would otherwise have caused a loss, and permanently deprive the insured of the possession of the thing insured.

In either of these views a peril of the sea within the rule as applied to marine insurance was the proximate cause of the loss, and the insurer is liable for a total loss.

In taking up the above proposition, let us assume the very worst phase, namely, that the action of the salvors was plunder. Nevertheless, under the circumstances of this case, it was a peril of the sea.

The leading case upon this subject is that of *Boudrett vs. Hentigg, Holt's Nisi Prius Rep. 149.*

There, as contended in the case at bar, the goods had arrived at the port of destination, the insurance being on goods from London to the Isle of France. The ship was wrecked off the coast of that island, but some of the goods were saved from the wreck and got on shore there, where they fell into the hands of the natives, who destroyed part and plundered the rest. The assured claimed a total loss. It was objected to his claim that it was not a loss by peril of the sea, and plaintiff had given no notice of abandonment. The issue was thus squarely raised as to whether or not under these facts there was an absolute total loss by perils of the sea. The court overruled the objection and said:

> "That an abandonment is not necessary to make this a total loss. The cause of the loss was the perils of the seas and the portion of the goods which was saved from the wreck, though got on shore, never again came into the hands of the owners. It is therefore a total loss to them from the perils stated in the declaration."

The case is cited with approval in *Arnold on Insurance (7th edition, p. 1184)* as stating the law upon the subject.

Likewise in *1 Phillips on Insurance*, §*1107*, it is said:

> "The underwriters are answerable for loss by plunder in direct consequence of the insured subject being at the time put out of the possession and control of the master and other agents appointed by the assured, by shipwreck or other peril insured against, though theft or plunder is not specifically insured against; whether the pillage is committed on the water or on land. It is a general doctrine, that all the loss directly consequent upon a peril is covered by insurance against it. Pothier says 'the insurers are liable for loss by plunder on shore, after the shipwreck of the vessel'."

The same principle is recognized by the Supreme Court of the United States in *Peters vs. Warren Insurance Co., 14 Pet. 110.* Here Judge Story directly meets the argument of appellant in the case at bar wherein the latter claims that there is no legal causal connection between the accident and the loss to the insured from the improper and unlawful conduct of the salvors, for it is there laid down:

> "That the maxim causa proxima non remota spectatur is not without limitations and has never been applied in matters of insurance to the extent contended for; but that it has been constantly qualified and constantly applied *only in a modified practical sense* to the perils insured against."

The learned judge says:

> "If there be any commercial contract which more than any other requires the application of sound common sense and practical reasoning in the exposition of it and in the uniformity of the application of rules to it, it is certainly a policy of insurance; for it deals with the business and interests of common men who are unused to deal with abstractions and refined distinctions."

A large number of illustrations are then given of the relaxation of the strict rule of causa proxima, in cases of insurance, among which is one covering the facts in the Bondrett case.

So stands the case under the common law. The policy, however, makes the provisions of the Civil Code of California binding in this respect, and that Code lays down the law in conformity with the above decisions with perhaps a little more distinctness. §2627 provides that,

> "An insurer is liable where the thing insured is rescued from a peril insured against that would otherwise have caused a loss, *if in the course of such rescue the thing is exposed to a peril not insured against which permanently deprives the insured of its possession in whole or in part, or where a loss is caused by efforts to rescue the thing insured from a peril insured against.*"

This is a distinct qualification of the previous section of the Code regarding the rule of *causa proxima* as relates to insurance, and without further illustration would seem under the facts of this case to answer appellant's argument, based upon the idea that the appropriation by the relieving vessels of the goods put upon them and the sale of the remainder of the cargo by the "Corwin" to satisfy its salvage lien was *not* a loss by perils of the sea and within the protection of the policy. The thing insured was on a sunken ship at sea, and unless rescued from its situation must have been a total loss (ante, p. 5). It was therefore within the meaning of §2627, "the thing insured * * * " rescued from a peril insured against that would other- " wise have caused a loss". Were we, therefore, to concede to appellant for the purpose of argument, that the subsequent action of the salvors was "a peril *not* insured against", it cannot be controverted that the thing insured was exposed thereto "in the course of such rescue" and the insured was thereby "permanently deprived of its possession". So far as the under-deck cargo is concerned, no part of it ever came to the possession of the assured (ante, p.).

"'*Sudden*'. I had no means to save her. I did all I could "to save her. As far as I was concerned she was a "goner" (Panno, p. 57). "*I* didn't expect, and *they* "didn't expect to save anything when they commenced "on it" (p. 267).

"We didn't suppose he would ever get the 'Sudden' "up; and if he didn't have all the appliances in the "world he never would; he would not have got the water "out of her. He had about 50 men and all the appli- "ances" (p. 299).

GOLLIN says: "I venture to say that the services ren- "dered by the 'Corwin' were such that no other steamer "would have rendered. They could not. They would "not have taken the steamer. Any passenger steamer, "loaded with passengers as they were, would only have "taken the crew off of the vessel, and would have left "the Catherine Sudden' to founder. The 'Corwin' was "particularly fitted for such an enterprise that might "come along" (pp. 86, 87).

The "Corwin" was herself hastening to Nome with an outfit to begin business, and, like the rest, no doubt deemed it important to get there at the earliest possible moment.

It is not necessary to go into much detail with regard to the merits of this salvage service, nor into the claim of the salvors that they were entitled to the *whole* of the proceeds. The value of the service was established by the only available tribunal at Nome, Captain Tuttle, of the Revenue Cutter "Bear", who decided that the salvors *were* entitled to the whole. If they were not entitled to the whole, still under the above facts the jury are cer-

tainly warranted in allowing *at least* 50 per cent of the cargo for such service. For this the salvors had a lien and were entitled to retain the possession. The portion taken out of the "Sudden" by the "Pitcairn" and "Rube Richardson", amounting to about 10 tons, was also subject to a like claim and a like lien.

This salvor's lien was a direct loss under the term "perils of the sea" as used in the policy.

> "The liability of the underwriter for salvage depends not upon his having engaged to indemnify against it by any express words in the policy, but upon its being made by the law of the land, or the general law maritime a direct and immediate consequence of perils against which he does insure.
>
> "Hence, in order to recover salvage expenses, the assured need not, and in fact ought not, to declare for loss by the payment of salvage; but he should declare as for that species of loss which occasioned the payment of salvage—as, for loss by perils of the sea, in case of salvage from shipwreck; for loss by capture, when the salvage is a remuneration to recaptors."
>
> 1 Arnold on Insurance, §863, 7th Ed.
>
> Peters vs. Warren, 14 Pet. 110.
>
> "Although salvage expenses, moreover, were formerly regarded as only coming under the 'sue and labor' clause of the policy, the House of Lords in the case of Aitchison vs. Lohre, 4 App. Cas. 755, above referred to, held them to be directly within the insurance against sea perils; although when the service has been engaged by the master or owner, it may be *also* within the sue and labor clause. So far, therefore, as they are a charge and a lien upon the ship, and thereby a 'hurt, detriment and damage to her', the insurers by the very terms of the policy are directly answerable to the assured who has paid them.

"As above observed, moreover, salvage expenses are not necessarily a general average charge. They are not so when made necessary, as not infrequently happens, by negligence in navigation. The Irriwaddy, 171 U. S. 189, 18 Sup. Ct. 831, 43 L. Ed. 130. Then they are in effect *particular average* (though not so within the memorandum, Price vs. Ins. Assn., 22 Q. B. Div. 580), to be borne by the shipowner, and hence by his insurer."

International Nav. Co. vs. Atlantic Mutual Ins. Co. 100 Fed. *313*. Affirmed, C. C. A., 108 Fed. 987.

To the foregoing add the following from 2 Parsons on Insurance, 151, Note 1:

"As salvage expenses are to be computed in making up a total loss, Bradlie vs. Maryland Ins. Co., 12 Pet. 378, 400, it follows that, *if they amounted to more than half the value of the vessel*, the assured would not be obliged to pay the salvage to prevent the sale, but might abandon, and claim a total loss."

See also cases herein, post p 31

In the case at bar the abandonment to the insurance company is conceded. Under these circumstances, there was, independent of the sale, sufficient evidence to prove a constructive total loss under this policy.

(b.) JUSTIFIABLE SALE—The cargo was, however, a constructive total loss in another sense. It was sunk and damaged. It was brought into the roadstead at Nome, but *when there, it was not yet relieved from peril.* All the witnesses testify without contradiction that, lying as it did in the open roadstead, it was in constant danger of going ashore and being destroyed—and that was, in fact, the fate of the vessel.

"A vessel in the condition that the 'Catherine Sudden'

" was in, being in such a dilapidated condition, practically " a wreck, she would certainly have gone on to the beach, " and everything would have been lost" (GOLLIN, Tr. p. 86).

" I was not going to take the chance of a storm coming " up. The vessel could not get out of the way. If a storm " came up she was bound to be lost" (GOLLIN, p. 98).

"The ship lay about a mile and a half or two miles off " the beach, without spars, sails or any propelling power " whatever, which left her in a very dangerous condition. " If a gale of wind came along she had nothing to get off " shore there, as the other vessels had. The weather there " is very catching. We are liable to get a gale there at " anytime" (HERRIMAN, p. 101).

" The real basis of my suggestion or recommendation " that the cargo be sold, instead of lightering it to the " shore, are three: First, the state of the weather at " Nome, the liability for a gale of wind to come on at any " minute and lose the whole; second, that the cargo had " been submerged with salt water, and the longer it stayed " there the more it would deteriorate; third, there was no " such thing as warehouse facilities to put that cargo in " when it got ashore; no place on the limit—on the beach " within the limits of Nome, taking it from Snake River to " the Standard Oil Works, where that cargo would have " been kept intact" (HERRIMAN, pp. 108-109).

" I am acquainted with the beach there. Have been go- " ing up there since 1898. Storms were likely to come up " on that beach at any time. There is no period of guar- " anteed fine weather that I know of there. Under such

" circumstances, a vessel lying at anchor about two miles " off shore, with no propelling or motive power, would be " practically a wreck. If she had no motive power, she " could not get away from there. If she was not taken " away, she would go ashore" (HIBBERD, p. 120).

Hence, the cargo on board was, at the time of sale, by reason of a peril insured against, in danger of absolute destruction, and then and there the proper subject of abandonment. It will be remembered that the insurance ran "until 30 days after arrival at port of destination", and so did not cease on dropping anchor, as is the rule where the insurance is only between named ports. As experienced men upon the ground, all the witnesses agreed that it was for the best interests of all concerned, that the goods be sold. Of this opinion, too, was Mr. Gollin, the agent of the underwriters. It was duly surveyed by a competent board of surveyors who recommended the sale, which was consummated with the consent of Mr. Gollin. Whether the sale might or might not have been differently conducted, so as to bring a larger return, of which appellant makes complaint, it would still have been a sale—a justifiable sale according to the undisputed testimony, and hence the assured was by a peril insured against (viz: the conditions which made the sale proper), permanently deprived of its possession at the port of destination.

Assuming now that the stores on the "Rube Richardson" and the "Pitcairn", and the coal alleged to have been taken on the "Corwin" were the property of the assured and were not lost, it is certain from the testimony that they did not amount to anything like 50 per cent of the cargo. While it is testified that the cargo so taken out was about

10 tons, it appears that the coal alone, covered by the insurance, amounted to 150 tons.

Now, where vessel or property is justifiedly sold after damage by perils insured against and condemnation, it is a total loss without abandonment.

> "The money arising from the sale in such case must be held by the master for the use of the underwriters; it is their property without any abandonment; *and if it come to the hands of the insured* it may be deducted from the loss as so much paid, this being what is called a total loss with benefit of salvage."
>
> Gordan vs. Mass. F. & M. Ins. Co., 2 Pick. 261.

So far, therefore, as relates to the sold cargo, it was an absolute total loss, and with the abandonment of the "Pitcairn" and "Rube Richardson" portions, the whole became a constructive total loss, even if the salvage lien were not a peril of the sea.

(c.) Sale Was Justified as the Only Legal Mode Under the Terms of the Policy of Adjusting the Loss—In the foregoing it will be noted that the percentage of damage is fixed by the testimony of witnesses directly to the percentage, and also by the claim of the salvors. This, however, is not the only evidence before the jury upon the subject, and upon which a finding of the proper percentage could be based. We refer now to that provision of the policy requiring the loss to amount to 50 per cent or more "on the sound value of the whole ship at the port of delivery".

It will be remembered that besides the groceries and canned goods, the under-deck cargo consisted of 150 tons

of coal, all insured under the single valuation, "$5250 under deck".

The testimony fixes the sound value of this coal at the port of destination at figures varying from $30 a ton (Hibberd, p. 120), up to $90 a ton (Moore, p. 251). Pope fixes the fair valuation of coal during that month at $50 a ton (p. 243).

An attempt is also made to place a valuation upon the lumber as high as $150 per M, and alongside ship in the harbor at $85 or $90 per M (Pope, pp. 244-245). Of course this means marketable lumber, which the testimony shows was not the nature of the lumber in the present cargo.

Taking the valuation of the coal at its lowest figure ($30 a ton) the sound value at the port of delivery of this 150 tons covered by insurance would be $4500. No doubt with the addition of the groceries and provisions this sound value would be largely increased. It is, however, sufficient for our present purpose if it shows that the sound value at the port of delivery of the whole cargo was *at least* $4500. All increase upon that amount would be in our favor, since, as we shall presently see, it would increase the difference between the sound value and damaged value, and so increase the percentage of loss.

Now, under the law, the proper mode of ascertaining the percentage is to compare this sound value at the port of delivery with its damaged value at said port, and thus establish the percentage of loss. But under the law the damaged value is to be ascertained *by a sale on arrival.*

"The damaged goods *are to be sold on arrival,* and

> the gross proceeds compared with the market value of sound goods at the port of discharge; and the ratio of the loss to the sound value, as thus ascertained, is the proportion to be paid by each underwriter upon his policy."
>
> International Navigation Co. vs. Atlantic Mutual Ins. Co., 100 Fed. 317-318.

So also the Supreme Court, speaking of the cases which establish the rule, says:

> "Those cases hold that the damaged goods, upon reaching their destination, *must be at once sold* for the best price that can be had. It is then to be determined what the goods would have been worth in the same market had they been sound; and the *difference* between the sound value *and the proceeds of the sale* of the damaged articles, gives the ratio of deterioration, and the underwriter is to pay this ratio or percentage of loss on the policy value."
>
> London Assurance v. Companhia, 167 U. S. 171-172.

The goods were sold as the law requires, and brought $530, which sum should be reduced by whatever is due to the salvors. Taking, however, the full sum of $530, we have a ratio of deterioration amounting to about 90 per cent, and the more we increase the sound value above $4500, the greater is the percentage of the loss.

By this means alone, the 50% damage is proven and a total loss within the terms of the policy established.

(d.) The Consent of the Agent of the Insurance Company—The foregoing argument leaves out of the question the fact that the sale was made with the express consent of Mr. Gollin, the agent of the Insurance Company.

The fact of his giving his consent is uncontradicted, but

the attempt is made to impeach the transaction by the suggestion that he exceeded his authority, or that he was deceived and did not know what he was doing.

So far as the latter suggestion is concerned, Mr. Gollin on the stand testified that he considered the proceeding perfectly fair, and whatever he did in the premises after mature reflection he would do again (p. 87). That if he had known the lighterage plant was there, he would still have advised the sale (pp. 99-100). We do not deem the discussion in which appellant indulges upon this point (Brief, pp. 67-70), within the province of the present appeal. The question, *if there be any,* was passed on by the jury adversely to appellant's contention.

But we feel equally certain that the part he took in the sale *was within* the authority conferred upon him. His appointment (p. 67) recites that,

"Cargoes may be jeopardized and losses sustained, " which it is supposed might be prevented by the exertions " of a trusted agent: Therefore it is deemed useful to " appoint an agent with power to act in preserving the " property for the benefit of whom it may concern." He is therefore appointed agent at Cape Nome "to *take* " *measures for preserving* and defending of property in- " sured by the respective organizations, etc.".

Under the head of "Sea Damage" (p. 71), he is instructed regarding the *manner of sale* of goods.

Under the head of "Auctions and Auctioneers" (pp. 74-75), he is instructed in *case of public sales* to "see that sealed tenders are advertised for, etc.", and he should also "endeavor whenever a public sale is

" necessary, *to have a voice in the appointment of the* " *auctioneer*, and should see that due publicity of sale is " given".

Under the head of "COMPROMISE", he is instructed that, where the expense of notarial documents, advertisements *and other charges of public sale* would be much increased, and the claim is small, he "may agree to an ap- " praised damage to the goods" (p. 75).

It is also contemplated that the salvage proceeds, using the term in the sense of the proceeds of the sale, *might pass into his hands*, and he is instructed what to do with them (p. 76).

By a special letter accompanying this appointment "Exhibit No. 2", he is told that an agent's duty is chiefly to *advise* the responsible parties.

All these point directly to the power of the agent to consent to the sale if he deems it for the best interests of his principal. Certainly a direction to endeavor to "have " a voice in the appointment of the auctioneer", implies a power to consent to the sale; for how can he appoint an auctioneer without making the auctioneer his agent? So, also, a direction that "sealed tenders shall be advertised for", is a consent to the sale, for what is a tender but a bid to purchase? The further direction that "the sale " should take place within a reasonable time after the " cargo is landed, etc.", contemplates a consent to the sale. The duty "to advise the responsible parties", contemplates a consent to the sale, for if he "advise" a sale does he not "consent" thereto? We do not think that the

court will have much difficulty in finding the necessary authority in the foregoing appointment.

But if he did not have such authority, by virtue of his appointment, his act in this regard was ratified by the defendant. The fact that he "had consented to the sale" had an effect on Davis' judgment when, upon presentation of proofs of loss, he said the loss should be paid (p. 61). He knew him, had faith in him and "was thoroughly satisfied with what he did" (p. 62).

If he had the authority to consent for the Underwriters and did consent to the sale as the best mode of preserving the property, does it not seem absurd for the appellant to attempt to deny total loss?

How much more absurd, however, is their attempt to discredit the act of the agent in consenting to a sale, when, as we have just shown, *the sale was the proper mode under the law to determine the loss.*

II.

THE SALVAGE TO LAUNCH AND BARGES.

It is next contended that the trial court erred in holding that the plaintiff in error was liable for the whole of the $2500 paid for the salvage service of the lighterage plant.

This contention, like the one respecting the cargo under deck, is principally based upon the assumption that the policy is an absolute total loss policy, and also assumes that the right of recovery for the barge and launches can only be justified under the "sue and labor clause".

1. A TOTAL LOSS BY PERILS OF THE SEA—In both of the above respects he is in error. The policy is *not* "free of average". Moreover, by the authorities just considered we find that salvage may be recovered under the policy as a "peril of the sea", as well as (where, like in this case, it was contracted for by the master) under the "sue and labor clause".

Appellant refers to it as a payment of only $2500 salvage, and to that part of the court's instruction which speaks of the reasonable value of services rendered the "Corwin" in discharging, as based on "certain hearsay testimony" (p. 47). This is an error. The salvage contract is in evidence, introduced by appellant, showing that the assured was to pay $2500 cash and give the use of the launch and lighters for the discharge of the "Corwin" (Rec. 223-224). We have also the direct testimony of Capt. Pauno, who made the contract, to the same effect. Speaking of the employment of the tugs by Captain Humphry, he says: "He first employed them to " take the cargo out of the 'Corwin' *in accordance with* " *my contract as part payment of the salvage*" (p. 57). " I made an arrangement at that time with the 'Corwin' " people with regard to the lighterage plant which was " on board. There was a written agreement signed at " that time between myself and the Captain of the 'Cor- " win', etc." (p. 266).

* * * * * * * * * *

" I did not pay any attention to the 'Dorothy' after I " got to Nome with respect to the discharge of the 'Cor- " win'. *I told Captain Simmie what I had agreed upon* " *and he done all that work*" (pp. 299-300).

Then follows the testimony referred to by appellant, of Capt. Simmie:

"I was informed by the captain of the 'Sudden' that "he had made arrangements with the Corwin Trading "Co. to lighter their cargo—that is, use the Nome Beach "Co.'s lighter and a small lighter belonging to the Corwin "Co., loaded with freight from the steamer to the beach. "I did that" (p. 280).

The value of those services is shown to be $2,000 (ante, p. 8). This testimony is uncontradicted. The assured, therefore, gave in value for said salvage services $4500.00 instead of $2500, as suggested by appellant.

Therefore, under the authorities just considered, the loss by the "*perils of the sea*" exceeds the value of the property fixed in the policy by at least $1500, and hence there was an absolute total loss of them under the policy. Plaintiff was, therefore, entitled to $3000, the value fixed in the policy.

2. Entitled to $4500 Under "Sue and Labor"—(a.) Taking as a basis for his first objection under this subhead, the theory that the policy is against actual total loss, only, appellant complains of the refusal of the court to substitute for the instruction actually given (No. 3, p. 328), one proposed by him, which, as stated in his brief, might lead to a misunderstanding. He says:

"Upon these authorities we requested the trial judge "to charge the jury (Trans. p. 313, request No. 8) that "defendant in error, plaintiff below, could not recover any "portion of the amount paid by it to the salvors for "the salvage of the lighterage plant, or any portion of

" the value of such service, if, in fact, said plant or any " material portion thereof, was not at the time the captain " of the 'Sudden' made his bargain with the salvors to " pay $2,500 for their towage into Nome, *in danger of* " *being lost* by reason of the accident to the 'Sudden'."

The instruction asked was as follows:

" Plaintiff cannot recover from defendant any portion " of the amount paid by it to the salvors for the salvage " of the lighterage plant, or any portion of the value of " such service, if, in facts, said plant, or any material " portion thereof, was not, at the time that Capt. Panno " made his bargain with the salvors to pay $2,500 for " their towage into Nome, in danger of being lost by " reason of the accident to the 'Sudden'. If from the " evidence you find that at the time Capt. Panno made " his bargain with the salvors for the towage of the light- " erage plant into Nome, that plant was not *in danger* " *of being wholly and totally lost*, then and in that case " your verdict should be for the defendant" (Tr. p. 313).

The difference is at once apparent, as this instruction makes it a condition that they be "in danger of being *wholly and totally lost*", which carries out the theory that the policy is "free of particular average". If our construction of the policy be right, this instruction was on that ground alone properly refused. It was further properly refused because, as we have just shown, the amount was recoverable as a total loss by "perils of the sea" and did not depend upon the "sue and labor", for its allowance.

It was still further properly refused, because adopting

appellant's own theory, the evidence did not warrant the assumption that they were not in danger of total loss. Appellant in this view, assumes that the salvage contract was entered into not because the outfit was in danger of loss, but to expedite it to a profitable employment (p. 49). In his argument to this end he has not only overlooked the contract itself, as well as mistaken the testimony of the witnesses, but has invaded the province of the jury by drawing inferences—which inferences are wrong. We refer to his argument that it is apparent in the nature of things that they were in no danger.

The salvage contract which was introduced in evidence by the appellant (p. 222-223), recites, that the "steam "launch, barges and surf boats are now adrift in the ice "in the Behring Sea and *in great danger of total loss "and destruction"*.

The testimony when properly read, is to the same effect. While it is true that Captain Panno said that it was his intention to steam the launch into Nome with the scow in tow, the statement was qualified with the suggestion that he would follow behind the "Pitcairn" and have a line from her to help him (p. 298), which was precisely the service rendered by the "Corwin", and which would simply have transferred the salvage claim from the "Corwin" to the "Pitcairn".

Neither did Captain Panno testify with respect to the steam capacity of the launch in the manner in which the quotation in appellant's brief would lead one to believe (p. 49). He said: "She is a small launch. She has "*as* big a steam capacity *as she ought to have to her*

" *size. I do not know anything about what it is*" (Tr. p. 300).

Her true steam capacity is fixed by Captain Simmie, her master, who says: "We could not put more that 2½ " tons in the bunkers. They would not carry more than " that" (p. 301).

When it is remembered that they were adrift in the ice of Behring Sea, a hundred miles, or more, from their destination, it would seem that from this cause alone they were in danger of absolute total loss. This, considered in connection with the testimony hereinbefore referred to regarding the nature of the sea in which they were adrift—subject to sudden and violent storms—and with the further fact that without aid they must have been overladen with their passengers and provisions, it would seem that the recital of the salvage contract stated the exact truth. Captain Simmie gives the true explanation of the intention of the parties, in the following language:

" I expected to require it to get ourselves to the place " of destination *if we possibly could.* * * * That was " our only means of preservation *and we were taking* " *those chances*" (p. 302).

3. Sum at Risk—Under this heading (p. 50), it is urged that the court erred in holding the plaintiff liable for the *whole of* the $2500 paid for the salvage service.

We have just seen that the value contributed for this salvage service was more than $2500, and was in fact $4,500. We have further shown that it was recoverable as a loss by the peril of the sea, and hence, to the full amount of the policy, or $3,000.

We further contend that it was recoverable under the "sue and labor clause" in accordance with the fourth cause of action in the complaint, and in that view, to the extent of $4,500.

The appellant's objection to this is based upon the construction placed by him upon the term, "sum at risk", contained in the sue and labor clause, his contention being that this amount is not controlled by the valuation in the policy, but by some other indefinite value of the interest to be ascertained by extraneous testimony (Brief, p. 51). He suggests that the error of the trial judge in this connection was "in reading the words 'sum at risk' " to mean the sum at the risk of the insurer" (Brief, p. 52). Of course the record does not show any such reading.

The portion of the "sue and labor clause" necessary to be considered is in the following language: "To the " charges whereof this Company will contribute in pro- " portion as the sum insured is to the whole sum at risk" (Tr. p. 19).

The entire argument of appellant shuts the eye to the nature of the policy in question, and attempts to construe it as if it were not a valued policy, and further, as if the insurance were only a partial insurance, instead of as in the case at bar, an insurance up to the full valuation.

In the first place, this is a valued policy, and the valuation is conclusive between the parties for all purposes. There is no fraud charged in arriving at the valuation, neither has the cargo been hypothecated by respondenture before its insurance.

Under these circumstances, the Code provides, §2736, that,

> "A valuation in a policy of marine insurance, is conclusive between the parties thereto in the adjustment of either a partial or a total loss, if the insured has some interest at risk."

Arnold states the same rule, 1 Arnold on Ins., 7th Ed., p. 411, in the following comprehensive language:

> "There is by English law no exception to the rule under discussion. As long as the contract of insurance remains unimpeached, the valuation in the policy can *under no circumstances be opened;* or, to use the words of Cockburn, C. J., 'Where the value is stated in the policy in a manner to be conclusive between the two parties, the insurer and the insured, as regards the value, *then in respect of all rights and obligations which arise upon the policy of insurance,* the parties are estopped' from disputing the value stated."

The foregoing language of Cockburn, Judge, is from the case of Insurance Assn. vs. Armstrong, L. R. 5 Q. B. 248.

In The Potomac vs. Cannon, 105 U. S. 630; 26 L. Ed. *1195,* the Supreme Court of the United States relying upon the above case said concerning the valuation:

> "That valuation is conclusive in respect *of all rights and obligations arising upon the policy of insurance."*

See, also,

> Providence SS. Co. vs. Phoenix Ins. Co., 89 N. Y. 565;
>
> The St. Johns, 101 Fed. *474.*

The "sum at risk" by the assured is therefore fixed by the terms of the policy.

Now appellant complains that because in the present instance the "sum at risk" as fixed by the policy, *happens to equal the sum insured*, in other words, because it is a *full* insurance instead of a partial insurance, the insurance company is called upon to pay the *whole* of the "sue and labor" expenses instead of a part of them. The answer to this is, Such is your contract. Had you desired otherwise you should never have insured up to the full value. You have agreed to pay these expenses in proportion as the sum insured is to the sum at risk. Since the sum insured happens to equal the sum at risk, you have agreed to pay the whole.

Following up that idea, appellant further says: "It " will be observed that, under this construction the limi- " tation of liability is not even measured by the amount " of the insurance, and that giving to the phrase its full " force, the insurer could be called upon to pay, by way " of suing and laboring expense *more than the amount in- " sured*. A construction which leads to this result would " seem to be absurd" (p. 53).

Such an argument is equivalent to saying that the elementary principles of the law of insurance regarding this subject are absurd, for it is the established principle of that law that expenses payable under the "sue and labor clause" *are in addition to a total loss if that afterwards occur*. C. C., §2743.

> "The assured may recover, under a marine policy, the value at which the subject is insured, and also the amount of expenditures in addition to a total loss."
>
> 2 Phillips on Ins., §1742.

Stress is laid upon the word "whole" and the attempt made to construe it to imply a value other than the agreed value. If there were any virtue on this suggestion it would be more than fairly met by the fact that the "sue and labor clause" is a printed portion of the policy, while the valuation is written, and necessarily varies with each policy. Where there is a partial insurance, and hence the "sum insured" less than the "sum at risk", the word "whole" would satisfy the most fastidious criticism, for the antithesis would then be broader and more apparent.

The policy itself, however, bears internal evidence that the "sum at risk" was understood by the parties to be the valuation, for the policy has this provision: "Risk " hereunder to cease at ship's tackle, or thirty days after " arrival of vessel at destination, upon merchandise *$3,000* " *on deck, $5,250 under deck,* laden, etc." If our construction of the policy were open to question, it would seem that this language would be decisive in our favor, as defining what is meant by the "sum at risk".

Finally, it is a well settled rule of construction, that if there be any ambiguity in the terms of the policy, such ambiguity is construed in favor of the assured and against the insurer.

> Wallace vs. German-American Ins. Co., 41 Fed. 743-44;
>
> London Assurance vs. Companhia, etc., 167 U. S. *159-160.*

The absence of authority on this question, to which appellant refers (p. 45), is in our view undoubtedly accounted for by the fact that "it had never before oc-

curred to anyone'' to make the contention advanced by him. For it is generally understood, as said by Judge Sanborn (Delaware Ins. Co. vs. Greer, 120 F. 920-21, C. C. A.), that,

> ''Contracts of insurance, however, are not made by or for casuists or sophists, and the obvious meaning of their plain terms is not to be discarded for some curious hidden sense, which nothing but the exigency of a hard case and the ingenuity of an acute mind would discover.''

III.

THE NEXT CONTENTION IS, THAT THE COURT ERRED IN REFUSING TO TAKE FROM THE JURY THE QUESTION AS TO WHETHER OR NOT THE PLAINTIFF HAD MADE SUCH REASONABLE EFFORTS FOR THE SECURITY, PRESERVATION, RELIEF AND RECOVERY OF THE PROPERTY INSURED AS REQUIRED BY THE "SUE AND LABOR CLAUSE' (p. 55).

This question was fairly submitted to the jury under the instruction of the court regarding the duty of the assured in that respect, but it is claimed by appellant that the court should have given a peremptory instruction to the jury to find for the defendant upon this proposition, upon the theory that the evidence was without conflict, and entirely in his favor.

1. In the first place, we are not prepared to concede it to be the law that the breach of this warranty forfeits all claim under the policy, notwithstanding the court so instructed the jury.

It has been held by respectable authorities, not the

least of which is Chief Justice Kent, concurring in the opinion of Justice Yates, that where an abandonment has been made to the underwriters the agents of the assured are answerable to the insurer for their defaults, if any exist in this respect, and *the rights of the assured* are not affected.

Gardere vs. Columbian Ins. Co., 7 Johns. 520;
Walden vs. Phoenix Ins. Co., 5 Johns. 324;
Center vs. American Ins. Co., 7 Cowan 229;
The Brig "Sarah Ann", 2 Sumn. 210;
Dickey vs. American Ins. Co., 20 Am. Dec. 766.

Our Code provides that (§2726),

> "Upon an abandonment, acts done in good faith by those who were agents of the insured in respect to the thing insured, *subsequent to the loss, are at the risk of the insurer* and for his benefit."

This relates back to the time of the disaster.

Dickey vs. American Ins. Co., 20 Am. Dec. *766*.

It is further flatly held that the failure to observe the "sue and labor" obligation, does not forfeit the right to recover, but if the loss is made greater by such failure, than it otherwise would have been, the excess alone so occasioned, cannot be recovered.

Franklin Ins. Co. vs. Cobb, 2 Cin. Sup. Ct. 90-93;
May vs. Cincinnati Ins. Co, 20 Ohio 228-30, citing
Gardere vs. Columbian Ins. Co., 7 Johns. 520.

In this respect, therefore, the instruction may have been *more favorable to appellant* than it should have been. If so, it is no cause for complaint on his part.

2. In the second place, the evidence upon this question was of such nature, as rather to warrant a peremptory instruction for the *plaintiff* than for the defendant.

It is not the duty of the assured under the "sue and labor" clause to go to the extremity urged by the appellant for the purpose of complying with that obligation. He is only bound to use *reasonable* means, or as it is sometimes put, he is *not* bound to exercise disproportionate exertions, expense or hazard.

> "'This clause in the policy defines the duty of the assured and their agents, in regard to the security, preservation and recovery of the property after the disaster; and the question is presented to you, therefore, whether such loss or misfortune happened, and whether, after it did happen, the defendants, and their agents in charge of the insured property, used all reasonable and proper means for the security, preservation, relief and recovery of the property insured. This is a question addressed to your sound judgment, in view of all the circumstances and all the evidence. Place yourselves in the position of the insured, and their agents in charge of the property at the time, and decide whether that provision has been fairly kept. *The question is not whether the best plan was adopted to save the property, or whether all was done that might possibly have been done by men of greater skill and more determined perseverance, but whether every reasonable and proper means was used.*'
>
> "I do not mean that any faint and waivering efforts would suffice to relieve the defendants from responsibility under this provision. There must be a use of all 'reasonable and proper means', by which I understand such means as 'a prudent, uninsured owner', would be expected to use under like circumstances."
>
> Franklin Insurance Co. vs. Cobb & Armel. II Cin. Supr. Ct. Rep. 90-91.

Accordingly it has been held that, in the case of the seizure of property at a sale by a prize court in New Orleans, where the question arose whether the sale ought to have been prevented by the assured giving bail, that *considering the fluctuating value of American currency at that time*, no prudent man would have given security to the full amount, and that the sale, therefore, not being a gratuitous act of the assured, was one of the direct and immediate consequences of the original seizure. Says the court:

> "We come, therefore, to the conclusion of fact that the assured could not, by any means which *he could reasonably be called upon to adopt*, have prevented the sale by the American Prize Court, which at once put an end to all possibility of having the goods restored in specie and consequently entitled the assured to come upon the insurers for total loss."

Stringer vs. Eng. etc. Ins. Co., L. R. 4 Q. B. 676, on appeal 5 Q. B. 599.

See also, Kent, C. J., in Gardere vs. Columbian Ins. Co., 7 Johns. 517.

Now, did not the parties in this case do everything which a reasonably prudent uninsured man could be expected to do, under like circumstances? They came ashore in a new and unsettled country; thousands of people stranded; affairs in a chaotic condition; no courts or established modes of procedure; no market; no means of raising money; money very scarce and held at exorbitant rates, and even then, only to be had as a favor; the initial trip of the company; their agent, sent there to prepare the way for them, mortally ill, and his funds gone; the salvors

insisting upon the sale of the property; refusing to recognize the master, and laughing at his pretentions supported in their claim by the only authority then at the place; and even if a salvage compensation could have been arranged, the vessel and cargo were nevertheless in a situation which, in the opinion of everybody then at the place, including defendant's agent, made it necessary that it should be sold *on board the ship* as the best means of saving what there was left. To this end it was surveyed and condemned. The law required it to be sold to adjust the loss. Yet in the face of this showing it is seriously urged that the court should have given a peremptory instruction upon this point in favor of the defendant upon the contention that notwithstanding these conditions, the master or some one else should have gone through the bare formality of offering "to arrange with the salvors the amount " of their salvage charge, to finance for this, to secure the " delivery of the goods, and take them from the vessel " to the shore" (pp. 58-59).

Taking the evidence as a whole, does it not appear absolutely certain that, in the language of the master he did not do anything looking to making an arrangement to get the goods out of their possession "because I had no resort to do anything" (p. 270).

Had a salvage arrangement been made, it must still have been sold on board ship if the board of survey and the witnesses are to be believed respecting its condition and situation. The supreme question was not, What amount the salvors were to have? but, What was the best practical means of saving something from the wreck? The salvors were willing to have their rights adjudicated

by a court *when it should arrive* (Gollin, p. 99), but they insisted upon the sale going on (Gollin, p. 100; Colcord, pp. 117-118).

With respect to the alleged failure of the master to make a contract with the salvors before permitting them to take hold of the vessel, it will be borne in mind that the cargo here in question is only a small portion of the entire cargo then on board the vessel. That the master testified if the Corwin people had not come along and rescued her as she did, "I presume that she would have soon " went to the bottom. I was prepared to abandon the " 'Sudden'. I had no means to save her. I did all I " could to save her. As far as I was concerned, she was " a goner" (p. 57). "I did not enter into an arrange- " ment with the captain of the 'Corwin' at that time or " with anybody else on board the 'Corwin' at that time as " to what should be charged for saving anything, except " the lighterage plant. I did not expect and they did " not expect to save anything when they commenced upon " it, so I could not make any arrangements" (p. 267). " We did not suppose he would ever get the 'Catherine " Sudden' up and if he did not have all the appliances in " the world he never would. He would not have got the " water out of her" (p. 299).

It will be remembered that at this time the "Sudden" was almost entirely submerged. There was no means of knowing to what extent the cargo had been damaged. The situation is described by the master as follows:

" If you were on board of a ship and had only a place " as big as that to stand on, about two by four, and the " vessel going down, if you did not know but what she

" would be going down any minute, what would you know " about anything going on?" (p. 49).

It is not urged that such a contract could then have been made with reference to the cargo, but *only that no effort* was made in that direction. Is it reasonable to suppose that under the circumstances any effort in that direction would have been successful? Are we to be penalized for not going through a dumb show, when the situation was such that no reasonable man could expect his efforts to be successful?

We do not feel that this contention merits any attention on our part. The court left the question to the jury under proper instructions, and we do not see how, in view of the evidence, its action in that connection can be criticised.

IV.

The next proposition urged by appellant is:

THAT THE GOING INTO THE ICE WAS IN EFFECT A WILFUL DESTRUCTION OF THE PROPERTY, AND THEREFORE THE INSURANCE COMPANY IS NOT LIABLE (pp. 70-79).

This matter is covered by instructions Nos. 13 and 14, p. 332.

The evidence is uncontradicted that the vessel was sent out in the care of the master, with instructions to do what he thought best, and what he should do in that respect was a matter of seamanship.

"I had no orders from the owners of the vessel in rela-

" tion to the time that I was to make on that trip in going " from here there. *I was master of the vessel and was to do* " *what I thought best.* I had no directions from the " owners in regard to putting in at any port on the way " up before to the Behring Sea. In going from San Fran- " cisco to Nome on that particular trip I had no instruc- " tions or directions from any officer or agent of the Nome " Beach Lighterage & Transportation Company as to " whether or not I should put into Dutch Harbor on the " trip. * * * When I first sighted the ice, I presume I " might have put about if I desired, and have gone to " Dutch Harbor. As a matter of seamanship, I could have " done it, because I could have come back to San Francisco " if I so desired" (p. 48).

So also, the issue raised by the answer is simply an issue of the good seamanship of the master in adopting that course and nothing else.

" Defendant is informed and believes, and upon such in- " formation and belief alleges, that plaintiff sailed the " said 'Catherine Sudden' into said ice, knowing full well " that so to do endangered the safety of said vessel, and " that so to do *was not consistent with good seamanship* or " with due and proper care, and that plaintiff, *when ice* " *was encountered,* in the exercise of proper care *should* " *have changed the course of said vessel* and have sought " open water or a port of safety until danger from ice be- " tween San Francisco and Nome had passed" (Record, pp. 35, 36).

Nobody but the master could, when ice was encountered, have changed her course.

It cannot, therefore, be contended that the owners sent the vessel into the ice with the intention of destroying her. They left it to the judgment of the master, who was on the spot and could best determine the propriety of going in. Both the answer and the evidence, therefore, confine the issue to the acts of the master.

I. It is One of the Risks Assumed by the Policy—It was, however, under this evidence, no fault of anyone. So far as the evidence shows it was usual and customary in that trade (pp. 307-8-9). Over thirty vessels similarly constructed were in the ice with her, bound on the same voyage (p. 49). It was the general practice (pp. 303, 307). It was, therefore, a risk contemplated by the policy. In fact, Davis, General Manager of the defendant, testifies: "I knew the nature of the voyage the 'Catherine " Sudden' was going on, and that it was more than ordin- " arily perilous and risky" (p. 63). And he received a larger premium for it (Id.).

Speaking of the act of a master in continuing seal fisheries after being warned away by the Government of Buenos Ayres, in consequence of which he was finally seized, Judge Story said:

> "The underwriters were bound to know the ordinary perils of the trade as much as the owner of the ship; and they took upon themselves the ordinary risks arising from the known claims and decrees of the Buenos Ayrean Government."
>
> Williams vs. Suffolk Ins. Co., 29 Fed. Cas. p. 1405, 3 Sumn. 276.

2. The Instruction Accurately States the Law—However, we will assume, for the purpose of the present argument, that the master was in fault in going into the ice, and that it was a wilful act upon his part. This would not excuse the insurer. Under the provisions of our Code (§2629),

> "An insurer is not liable for a loss caused by the wilful act of the *insured;* but he is not exonerated by the negligence of the insured *or of his agents or others.*"

A fair construction of this statute would be, that, to exonerate the insurer, the wilful act, if any, must be that of *the insured,* and not of his agents, for it will be observed that with respect to the "wilful act", the provision speaks only of the insured, while with respect to negligence it speaks both of the insured and his agents, thus showing an express intent to confine the exoneration of the insurer to the wilful act of the insured himself, and not to include the wilful act of an agent.

This distinction was observed by Story, J., in the case of Catlin vs. Springfield F. I. Co., 1 Sumn. 434, where the policy exonerated the insurance company from losses by "design of the assured". The court remarked:

> "The losses excepted are not losses by design, generally, but 'losses by design of the assured'. The case then is reduced to the consideration of what constitutes a loss by design in the assured within the meaning of the policy. I say that it is not a loss by the mere negligence or laches of the party, where he has left the property exposed to the peril, but has not co-operated directly or indirectly with those who produced the loss. Design imports plan, scheme, intention carried into effect. The loss to be

> by the design of the assured, in the sense of the policy, must be by incitement, connivance or co-operation of the assured, directly or indirectly *with the persons who were agents* in the act."

So here, the "wilful act" excepted is not a "wilful act" generally, but the "wilful act of the insured", and does not include the wilful act of "the persons who were agents in the act".

Barber, in commenting upon the above section of the Code, says:

> "The prevailing doctrine is, that acts of the assured or his agents intentionally though negligently done, resulting in the loss of the insured property through the operation of the destructive agency insured against, do not preclude a recovery on the policy in the absence of some provision to that effect" (p. 123).
>
> "It seems, as the general result of the authorities, that in the absence of some stipulation to the contrary in the policy, the insurer is liable for a loss caused proximately by the operation of the peril insured against where such operation was induced by an act or omission of the assured (not violating any warranty in the policy) found by a court or jury to have been merely negligent, and *free from any intent that such act or omission should result in loss or injury to the insured property*" (p. 127).

This is also the construction placed upon the section by the Supreme Court of the State of California, where it is said that the object of the framers of the Code was to do away with the very question here raised by appellant under the authorities which he quotes:

> "The ordinary negligence of the insured and his agents has long been held as a part of the risk which

the insurer takes upon himself, and the existence of which, where it is the proximate cause of the loss, does not absolve the insurer from liability. *But wilful exposure—gross negligence—negligence amounting to misconduct, etc., have often been held to release the insurer from such liability.*

"*To set at rest questions involving the different degrees of negligence, and the results following therefrom, we may reasonably suppose was the object of the framers of our Civil Code.*

"Under Section 2629 of the Civil Code *the nice distinctions often made necessary are dispensed with, and the general proposition is established that no form of negligence* on the part of the insured, or his agents, or others leading to a loss avoids the policy, unless it amounts to a wilful act *on the part of the insured.* The Code thereby sets at rest a fruitful cause of litigation." McKenzie vs. Scottish U. & N. Ins. Co., 112 Cal. 557.

Since the provision of the Code is, by the very terms of the policy, controlling, this should set the entire question at rest.

This is also in accord with the views of the subject as expressed by the Supreme Court of the United States in Ins. Co. vs. Adams, 123 U. S. 67, where the court said:

"But it is insisted that the Court should have granted the request of the Company to the effect that it was not liable if the accident and loss were caused by the 'misconduct' of the master. Had that request been granted, in the form asked, the jury might have supposed that the Company was relieved from liability if the master was chargeable with what is sometimes described as *gross negligence* as distinguished from simple negligence. Hence the Court properly said, in effect, that the misconduct of the master, *unless affected by fraud or design, would*

> *not defeat a recovery on the policy.* The principle upon which the Court below acted was that expressed by Chief Justice Gibson in American Ins. Co. vs. Insley, 7 Pa. 229, when he said that '*Public policy requires no more than that a man be not suffered to insure against his own knavery, which is not to be protected or encouraged by any means;* for though the *maxim respondent superior* is applicable to the responsibility of a master for the acts of his servants, yet the insured, so long as he acts with fidelity, is answerable neither *for his servants nor for himself.*' Williams vs. Suffolk Ins. Co., 3 Sumn. 276."

See also, The Barnstable, 84 Fed. 901.

Accordingly, in a case involving the same facts as the case at bar, being a case against another insurance company upon the same vessel, for the same voyage, Judge Morrow held that the facts of the case were distinctly within the rule above set forth, and that the misconduct of the master, unless effected by fraud or design, would not defeat a recovery under the policy.

> Nome Beach Lighterage & Transportation Co. vs. Munich Assurance Co., 123 Fed. 820-*826.*

3. The Policy Covers Barratry—In addition to the foregoing, it will be noted that the policy here in question covers insurance "against the barratry of the master or mariners" (p. 19), and hence was in express terms an insurance against misconduct of the master amounting to fraud or design, since that is the very definition of "barratry". 1 Phillips on Ins., §1062.

Appellant attempts to escape this conclusion by the citation of Grim vs. Phoenix Ins. Co., 3 Johns. 451, but the misfortune of that attempt lies in the fact that the

case of Grim vs. Phoenix is not only expressly overruled in New York (11 N. Y. 20), but it is also discredited by the Supreme Court of the United States.

Upon this subject the court, in the above case of Orient Mutual Ins. Co. vs. Adams, 123 U. S. 67, said:

> "In Columbia Ins. Co. vs. Lawrence, 35 U. S. 10 Pet. 517 (9:516), which was a case of insurance against fire on land, the court said that: 'A loss by fire occasioned by the mere *fault or negligence* of the assured, or his servants or agents, and *without fraud or design*, is a loss within the policy, upon the general ground that the fire is the proximate cause of the loss, and also upon the general ground that the express exceptions in policies against fire leave this within the scope of the general terms of such policies.' In the subsequent case of Waters vs. Merchants' Louisville Ins. Co., 36 U. S. 11 Pet. 224 (9:696), it was said, in reference to the case of Columbia Ins. Co. vs. Lawrence, that 'The court then thought that in marine policies, *whether containing the risk of barratry or not*, a loss whose proximate cause was a peril insured against is within the protection of the policy, notwithstanding it might have been occasioned remotely by the negligence of the master and mariners.' To the same effect are Patapsco Ins. Co. vs. Coulter, 28 U. S. 3 Pet. 237 (7:665); General Mut. Ins. Co. v. Sherwood, 55 U. S. 14 How. 352 (14:452), and Phoenix Ins. Co. vs. Erie & W. Trans. Co., 117 U. S. 325 (29:879)."

It is therefore plain that, since the evidence is undisputed that the insured did not send the vessel into the ice, but left the manner of proceeding to the judgment of the master, if it was in fact improper to go there, whether the act was prompted by "gross" negligence or "fraud or design", of the master it was equally covered by the policy.

We may consider it settled law for this jurisdiction that gross negligence of the master does not excuse the insurer. Indeed, gross negligence of the insured himself, does not excuse, for, "so long as he acts with fidelity he is " answerable neither for his servants nor for himself".

We do not think there is any profit in taking up the consideration of the other authorities cited by appellant under this head. The quotation from Emerigon and Phillips (pp. 75-6-7) are not in conflict with our position, except in so far as the quotation from 1 Phillips, §1046 a (77) refers to "gross negligence", and in this respect it is in direct conflict with what we have seen is the meaning of our Code as construed by the Supreme Court of California, as well as in conflict with the opinion of the Supreme Court of the United States.

It is to be noted, however, that the citation from Phillips does not point to either negligence or misconduct of an agent of the insured, but only to that of the insured himself.

The other citations on pages 74 and 75 if not directly overruled, are certainly superseded by the later authorities above referred to, in which the question has been finally settled for us.

It is well to note that Williams vs. New England Ins. Co., is founded on authorities distinctly discredited by Judge Story in Williams vs. Suffolk Ins. Co., 3 Sum. 276 (29 Fed Cas. p. 1404-5) and in which he says that Cleveland vs. Union Ins. Co. "can hardly be considered as " satisfactory authority". A note to the case (29 Fed. Cas. p. 1406), informs us that the ~~New England Ins. Co.~~ Case of Cleveland vs Union Ins. C

case was never retired, but the insurers paid because it was "understood Chief Justice Parsons expressed a decided "opinion against the underwriters and recommended a "settlement". Neither Justice Parsons nor Justice Thatcher had sat on the original hearing.

V.

We think the questions raised by the instructions mentioned in appellant's brief under headings V and VI (pp. 79-83) are fairly covered by the points made in the foregoing argument and as appellant contents himself with a mere memorandum reference thereto, we do not think it necessary to tax the patience of the court any further in that direction.

1. In passing we point out that the appellant erroneously suggests on page 82 that there is no evidence to support the statement "that the captain "of the revenue cutter then at Nome was recognized as "an authority to determine the question of salvage, that "he acted as an arbitrator between the insured and the "salvors", and as such gave the ship and cargo to the salvors.

The master testifies (Rec. p. 59):

"I mean when I say that Capt. Tuttle of the 'Bear' "gave it all to the 'Corwin', that there was no court "there, and Captain Tuttle was the court. They called "a meeting and decided that what Capt. Tuttle said was "law. I had a conversation with Capt. Tuttle about the "goods being turned over; I asked him why he gave

" it to the 'Corwin'—gave it all to them and he said, as " long as the ship was going down, and they saved her, " that they ought to have it all."

Capt. Hibbard says, p. 121: "The government in that " country at that time was entirely in the hands of the " revenue officers, who took the place of the courts."

2. The suggestion that the court confused the question of seaworthiness with that of an intentional assumption of the risk in putting the vessel into the ice, leaves out of sight, the real issue as made by appellant himself. The instruction was in strict accord with the defense as appellant himself stated it:

" One of the points that will be submitted to you in this " case is, whether or not this plaintiff sent, under the cir- " cumstances, at that season of the year and at that time, " a seaworthy vessel upon that voyage. There is no " question but what she was seaworthy so far as open " water is concerned, but whether or not sending that " vessel up with Captain Panno, who was in charge of " her, under instructions to get into Nome at the opening " of the season, *they did not knowingly send a vessel that " was incompetent to go through the ice under those cir- " cumstances simply to her death if she went in the ice.* " THAT PROPOSITION INVOLVES A TECHNICAL DEFENSE ON THE " QUESTION OF SEAWORTHINESS, AND HIS HONOR WILL IN- " STRUCT YOU IN THAT REGARD. That is not our principal " defense, but that is one of them. Whatever the fact " might be about the 'Sudden's' seaworthiness in open " water, or in ordinary sea, we are not claiming that she " was unseaworthy in those particulars. Our claim is that

" she was not a ship that was fit to be put into the floating " ice of Behring Sea at that season of the year" (pp. 45-46).

3. The cases cited on p. 85, to the effect that sale at Nome under claim of salvors is not a loss by "perils of the sea" are no longer law even in England, since the decision of the case of Aitchison vs. Lohre, 4 App. Cas. 755.—See 100 Fed. 309-313; and they certainly are not law here. See ante, p.

VI.

THE RECORD DOES NOT CONTAIN A VALID BILL OF EXCEPTIONS TO THE INSTRUCTIONS.

We have thus carefully gone over the disputed instructions because we desired the court to see that our case was not based on technicality but on justice, and also from a certain sense of duty to the end that the trial court be not placed in a false position.

The appellant is, however, not, on this appeal, entitled to raise any question regarding the instructions, because he has not taken proper exception thereto. The omnibus exception which he did take could give the lower court no opportunity to correct any error, if error there be, but could only serve to entrap him. The record is as follows:

" Defendant, at the conclusion of said charge, and " while the jury were still at the bar, duly excepted in " writing to the refusal of the court to give the instruc- " tions requested by defendant, and to each separate re- " fusal of the court to give each separate instruction re-

" quested by defendant and to the giving of each instruc-
" tion given by the court at the request of plaintiff, and
" to the giving of each instruction which was in fact
" given, and its said exceptions and each of them were
" allowed by the court" (p. 333).

The rule is well settled that this is not such an exception as can be reviewed in the appellate court. The general rule is thus stated in Mobile, etc., R. Co. vs. Jurey, 111 U. S. 584 (28 L. Ed. 532):

> "Conceding that the charge in respect to the rate of interest was erroneous, the judgment should not be reversed on account of the error. The charge contained at least two propositions: first, that the measure of damages was the value of the cotton in New Orleans, with interest from the time when the cotton should have been delivered; second, that the rate of interest should be eight per cent. It is not disputed that the first proposition was correct. But the exception to the charge was general. It was, therefore, ineffectual. It should have pointed out to the court the precise part of the charge that was objected to. 'The rule is, that the matter of exception should be so brought to the attention of the court, before the retirement of the jury to make up their verdict, as to enable the judge to correct any error if there be any in his instructions to them.' Jacobson vs. State, 55 Ala. 151.
>
> " 'When an exception is reserved to a charge which contains two or more distinct or separable propositions, it is the duty of counsel to direct the attention of the court to the precise point of objection.' R. R. Co. vs. Jones, 56 Ala. 507.
>
> "So in Lincoln vs. Claflin, 7 Wall. 132 (74 U. S. xix, 106), the court said: 'It is possible the court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods. * * * But the error, if it be one, cannot be

> taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the bill. * * * It embraces several distinct propositions, and a general exception cannot avail the party if any one of them is correct.' On these authorities we are of opinion that the ground of error under consideration *was not well saved by the bill of exceptions.*"

The special language of the exception now under consideration, viz.: "to the refusal of the court to give the " instructions requested by defendant, and to *each separate* " refusal of the court to give *each separate* instruction, " etc.", is passed upon by both the Supreme Court and the Circuit Court of Appeals in the following cases:

> Block vs. Darling, 140 U. S. 234 (35 L. Ed. *478*):
>
> The defendants, at the close of the charge, 'excepted to all and each part of the foregoing charge and instructions, and the same was all the charge or instruction given by the court.' 35 L. Ed. *477*."

The court said:

> "2. Although we have jurisdiction, so far as the value of the matter in dispute is concerned, the question is not properly before us as to whether the court erred in its charge to the jury upon the counter-claim. The general exception 'to all and *each part of the foregoing charge and instructions*', suggests nothing for our consideration. It was no more than a general exception to the whole charge. The court below was entitled to a distinct specification of the matter whether of fact or of law, to which objection was made. The charge covered all the facts arising out of the counter claim, and clearly stated the law which, in the opinion of the court, governed the case. If its attention had been specifically called at the time to any particular part of the charge that was deemed erroneous, the necessary correction could have been

made. An exception *'to all and each part'* of the charge gave no information whatever as to what was in the mind of the excepting party, and therefore gave no opportunity to the trial court to correct any error committed by it."

Price vs. Pankhurst (C. C. A., 8th Circ., 1892) 53 Fed. 312:

"The bill of exceptions, after reciting the whole charge, concludes as follows: 'To the giving of which said instruction the defendant specially objects and excepts, and prays that his exception be duly noted of record; said exception being to the whole of said instruction, *and to each and every part thereof.*' The charge contains several propositions of law, some of which are undoubtedly sound. The rule is well settled that, if the entire charge is excepted to in gross, and any portion of it is sound, the exception cannot be sustained (citing cases). Upon the organization of this court, the practice on this subject, as settled by the uniform decisions of the Supreme Court, was formulated into a rule, and adopted as a rule of practice of this court, in the following terms:"

* * * * * * * * *

(The rule referred to is identical with Rule 10 of this Circuit Court of Appeals.)

"This rule was designed to put an end to allowing bills of exceptions like the one in this case. It matters not that the judge may be willing to consent to such a bill. *He cannot waive the rule, so far as it relates to specific exceptions, if he desires to do so.* The rule is not made for the judge's personal protection or benefit, but for the protection of suitors and the advancement of justice. It is the duty of the party excepting to call the attention of the court distinctly to the parts of the charge he excepts to, and this must be done before the cause is finally submitted to the jury, to the end that the court may have an opportunity to correct or explain the parts of the

charge excepted to, if it seems proper to do so. The practice which it has been intimated at the bar sometimes obtains of taking a general exception to the whole charge, with leave to specify particular exceptions after the trial, is a plain violation of the letter and spirit of the rule. The party who conceives the charge is erroneous in any respect, and remains silent, will not be heard to point out the error after the trial; and a general exception to the whole charge, any part of which is good law, is equivalent to silence. *The rule is mandatory. Its enforcement does not rest in the discretion of the lower court. Its enforcement is essential to the proper and intelligent administration of justice.* It serves to correct hasty, inaccurate, or misleading expressions in the charge; it affords an opportunity for explanations and qualifications which might otherwise be overlooked, and sometimes, by removing the ground of exception, prevents further litigation. It is, of course, the duty of the court to allow the parties reasonable time and facilities for specifying exceptions. There is no occasion for haste in charging a jury. No part of the trial should be conducted more deliberately and carefully, and no court will refuse a party time and opportunity to point out distinctly his exceptions to the charge before the case is finally given to the jury. He must be afforded opportunity to do this then, because he is precluded from doing it afterwards. There being no error on the face of the record, *and no error saved by the bill of exceptions*, the judgment of the circuit court is affirmed."

St. Louis R. R. Co. vs. Spencer, 71 Fed. 94:

The record in this case is as follows:

"At the conclusion of the charge, counsel for defendant stated to the court that they noticed that the prayers for instructions submitted by them were not embodied in the charge of the court, and they desired then and there to except to the court's action in refusing to give in charge *each of said instructions*,

which several exceptions were noted. They further stated that they could not, upon hearing the charge read, state to the court their objections to it, but desired *to except to each and every sentence in the charge given,* with leave to state their objections upon the record at some future time. Counsel for plaintiff demanded that counsel for defendant state their objections to the charge given before the jury left the box, to the end that such objections might be considered, passed upon, and if well taken that the charge might be corrected. Counsel for defendant stated that they could not do this, as the charge was oral, and asked that time be given to have said charge written out, that they then might have time to save their exceptions to the same. Thereupon the court announced to counsel, that if it is in the power of the court, they shall have time to examine the charge after it has been reduced to writing, and point out specifically any objections they might have to the same, or any part thereof. And the court noted their exceptions *to each and every sentence in the charge given,* with leave to state their objections in future, to which leave plaintiff then and there objected."

Held, the exceptions could not be sustained.

The cases to this effect are numerous and uniform.

We have already called attention to the fact that Rule 10 of this court is identical with the rules referred to in the foregoing decisions. We, therefore, think that there is nothing before the court on exception to the instructions.

VII.

The Rulings on Questions of Evidence—Of the seventeen assignments of error on questions of evidence, the appellant has included in his specification of error in his brief, but six, and has argued but two, divided into three

sections. We have said "has argued", but the flippant manner in which the question is passed up to counsel for respondent can scarcely be called argument. He says: "It would seem that argument upon these rulings would "be a useless waste of the time of this court. We leave "it to the ingenuity of counsel on the other side to "suggests some possible support therefor" (p. 91).

Under these circumstances we feel that we would be warranted in ignoring the question. The burden is on him who alleges error to prove error, and if he does not see fit to do so there is no occasion for "counsel on the other side" to offer suggestions.

The evidence, however, was proper, and being undisputed, is sufficient to warrant the court in taking the whole case from the jury and directing a verdict for plaintiff in the full amount prayed for.

Mr. Davis was the general manager of the defendant corporation. *The reinsurers were neither parties to the contract of insurance nor to the litigation.* The introductory remarks of appellant, on pp. 88 and 89 of his brief, have, therefore, no legal bearing upon the issue.

As general manager Mr. Davis had a perfect right, if he saw fit, to adjust the loss in any manner he deemed proper, to pay the loss if he saw fit, or to consent to judgment in the present case if he saw fit, and *so far as the appellee is concerned,* the reinsurers had no interest or right to object.

Farnum vs. Phoenix Ins. Co., 83 Cal. 262.

If, before suit brought, Mr. Davis told the assured that he considered its demand just and in all fairness they should receive their money under the policy, that was an adjustment of the amount due and an acknowledgment of liability. The assured makes a demand for his money, and the insurer says: "You are entitled to "it, but for some ulterior reason personal to myself, and "which does not affect your right to the money I will "not pay it." This is an admission of liability made by the defendant itself, and why we are not entitled to the evidence is beyond our understanding.

Counsel admits that the question itself is unobjectionable, by reason of the averment of the complaint that prior to the commencement of the action the loss was adjusted. The question is, "Did you have any conversation with Mr. "Davis, the Manager of the Company, concerning the "payment of the loss and the amount?" The witness then proceeds to tell what the conversations were, *only part* of which appellant moved to strike out. If, as conceded, we are entitled to part of the conversation, then we are entitled to it all.

Moreover, the matter is competent because the allegation in the complaint is not only that said loss was adjusted, but "that the said defendant then and there ad-"mitted the said loss to be a loss by a peril of the sea "and admitted the amount thereof to be $8,250" (p. 6). A similar allegation will be found after each of the causes of action (Art. VIII, p. 10; Art. VIII, p. 13).

The testimony in question is a direct admission of the facts set forth in said allegation and an explanation of the reason why payment was not made accordingly.

It is also plain that this admission was a waiver of the defenses set up in this action. It will be remembered that the testimony shows that Mr. Davis had full knowledge of all the facts in the case, and himself testified that he was satisfied therewith: "The plaintiff notified me and gave "me freely all the information I asked for respecting "that loss. Myself and the reinsurers called a meeting "to hear all the facts of the case. Mr. Van Ness was "at one meeting and asked witnesses on our behalf some "questions respecting this loss. The plaintiffs presented "to me many proofs of loss; I do not remember just "what I asked for at the time, but the proofs, as far as "I am personally concerned, that were furnished, were "satisfactory. * * * Having these facts before me, "I said to the plaintiff regarding its right under the "policy and the amount that should be paid to it, in my "opinion the proofs that were furnished were sufficient, "and the loss should be paid, but that I could not admit "full liability, or liability, on account of being stopped "by my reinsurers" (pp. 60-61).

This statement of Mr. Davis was not objected to by respondent, though there is an objection to another question interjected between the two parts of this statement.

This is substantially the same testimony as that of Mr. Pennell, to which objection is made. Being before the jury without objection, how can it be said that the testimony of Mr. Pennell upon the same subject, even if improperly admitted, was injury?

But to return to our main point, the foregoing, as does also Mr. Pennell's testimony, shows that Mr. Davis at

the time of this conversation "had full knowledge of all " the facts when after the examination of the witnesses " and vouchers it expressed its satisfaction with the " proofs", and admitted that the demand was just and that in all fairness the defendants should receive their money.

This is a waiver of all forfeitures.

Silverberg vs. Insurance Co., 67 Cal. 38;
West Coast L. Co. vs. State, etc., 98 Cal. 512.

We are aware of the fact that in each of the foregoing cases there was, in addition to the knowledge and satisfaction with proofs, a promise to pay, but inasmuch as the reason here given for not paying *was not a valid reason*, the admission of liability and amount is complete.

In the case of Farnum vs. Phoenix Insurance Co., 83 Cal. 262-3, the policy contained a clause requiring arbitration if the parties failed to agree upon the amount of the loss. The plaintiffs furnished to defendants proofs of loss to the extent of one thousand dollars, and thereupon, *without questioning or making any objection to the amount of loss claimed,* or proofs thereof, the company, *for other reasons,* not only denied its liability, but denied the existence of the policy, claiming that it had been cancelled two months before the loss.

The court held:

> " *This was sufficient evidence that the defendant acquiesced in the amount of the loss claimed* and thereby waived its right to have it determined by arbitration."

In the case of Goodwin vs. Insurance Co., 73 N. Y. 480-496, it was said:

> "When an insurance company by means of its officers or agents, in response to a claim for a loss, fails to say anything about the time of presenting the proofs after it has expired, but *claims some other defense, the presumption is that it does not intend to interpose any other besides that named,* and it is a fair inference to be derived from the fact that it was silent upon the subject, that it designed to waive the violation of such a condition. When called upon to adjust a loss was the time to speak by its agents or officers, and in failing to do so, and by silence, it acquiesces in a waiver of any such defense and is, I think, estopped from interposing the same."

So in Cahill vs. Andes Ins. Co., 5 Biss. 211; Fed. Cas. No. 2289, it was held that where a company had claimed to cancel a policy on the ground that the premium had not been paid, *they were bound by the reasons which they had thus assigned*, and could not afterwards rely upon some other reason.

We therefore contend that not only was the evidence competent under the pleadings, but that it is in fact conclusive of the whole case and shuts out all the defenses attempted at the trial.

VIII.

1. It is sufficient reply to the 9th objection (Brief, p. 91) that if for no other reason, the answer was competent because Mr. Gollin's ability was directly put in issue by the appellant himself. The claim being made that he allowed himself to be deceived, it was therefore perfectly

competent to show that he was an experienced insurance man and a man of ability.

2. It was further competent, because, as we have already seen, the nature of the information possessed by Mr. Davis at the time he told the defendants that they were entitled to be paid was a proper matter for consideration.

3. It was further proper because Mr. Davis ratified the acts of Mr. Gollin in consenting to the sale, and it is proper that the nature of the information upon which he made such ratification be placed before the jury.

We respectfully submit that the judgment of the lower court should be affirmed.

NATHAN H. FRANK,
Attorney for Defendant in Error.

No. 979.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND (a corporation),

Plaintiff in Error,

vs.

NOME BEACH LITERAGE & TRANSPORTATION COMPANY (a corporation),

Defendant in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

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Defendant in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

It will be remembered that under the first heading in our brief (pp. 17-38) we made the point that the instructions of the Court there under consideration were sustained by the fact that the under deck cargo was an *actual* total loss, and even if it had not been an actual total loss, the evidence was still sufficient to warrant the instruction because it would at least warrant a finding of a *constructive* total loss.

This latter position is now assailed by appellant. In the first place, he shows great concern about the *theory* upon which *he* alleges the *respondent* tried the case in the lower court, and with an interesting assurance asserts that when the complaint was drawn the pleader never had in mind a constructive total loss, and that such a theory never was suggested until our brief on appeal was written. Now, if this were true, and we shall presently indicate why it is not, we do not think this Court is at all concerned with the fact. The only question to be determined is, can the instruction of the Court be sustained under the law. What ever theories counsel may have, the Court gives its instructions upon its own theory of the law, often rejecting the theories of both counsel as embodied in their proposed instructions.

But we are not at fault if, as is often the case, appellant was so blindly wedded to one idea as to be unable to comprehend the full scope of his case. When he says that the theory of a constructive total loss was never suggested until our brief was written, he ignores the indisputable evidence to the contrary, viz, our proof, made at the trial, *of an abandonment*. Trans. pp. 63, 64. It is true, appellant says "this evidence did not establish an abandonment" (Reply Brief p. 10), but whether it did or not, it is conclusive of the fact that respondent, conceived *before suit brought* and developed *at the trial*, the theory that he could and would fortify himself with the double claim of a constructive as well as an actual total loss—before suit brought by making the abandonment, at the trial by proving it.

But, says, appellant, the facts of the case do not bring it within the provisions of section 2717 C. C. permitting an abandonment, and if it did, there is no *proof* of an abandonment. On both these contentions he is driven into a very narrow corner. We are perfectly content to rest the question, as to whether or not the facts, as set out in our brief (pp. 26-38), are such as would warrant an abandonment under Sec. 2717 C. C. As to the *proof* of the abandonment, we said (p. 30) "In the case at bar the "abandonment to the insurance company is conceded." Now appellant says there is no such concession and no proof. But does he sincerely believe that he can in that way dispose of the testimony of Mr. Davis, General Manager of the company, who when asked "Did this company "subsequently make an abandonment of this cargo to "you?" and is shown a paper, replies, "I do not know "whether that is the paper or not, *but you served an "abandonment on us*, which was returned and not ac- "cepted"?

It is said it does not appear the paper referred to, either in form or substance met the requirements of the Code, and that its rejection might have been for that reason. The conclusive reply is that if it was rejected for any such reason, it lay with the insurance company to prove it. The statement of the witness that an abandonment *was* served, carries with it an implication that it was in due form, sufficient to make a *prima facie* case, and the burden is on the insurer to show it was not. The fact that it was not accepted, can not avail appellant, for an acceptance is not necessary to our rights (*C. C.* §2727) and the refusal does not affect them (*C. C.* §2731). Be-

sides the witness further said that he thought the claim was just and should be paid, thus indicating that the rejection was a mere formality.

But, it is further to be observed, that the provisions of the Code respecting abandonment to which appellant refers, are but a reiteration of the common law upon the subject, and that the Code also provides that an "abandonment" is made by giving notice thereof to the insurer, which "may be done *orally*, or in writing" (§2721).

This in itself, indicates that there is no stringent formality required. And so the authorities indicate. Mr. Joyce says:

> "We deduce from an examination of the cases that the question rests upon the *intention and understanding* of the parties with respect to an abandonment. The true rule seems to be this, that if it clearly appears from the facts, circumstances, grounds, and reasons upon which the assured proceeds, and from the character and terms of the demand or claim, that assured clearly intends to abandon, and such intention is so evident that it must have been so understood *or if so understood by the assurers, the claim for a total loss will imply an abandonment, even though it is not formally and in terms expressed*" 4 Joyce, p. 2919.

In this the author is supported by the Circuit Court of Appeals, Sixth Circuit, (*Ins. Co. v. Johnson*, 70 Fed. 796), where it was not only said that

> "All that is necessary is that the intention to abandon shall be made clear enough fully to advise the underwriter that the vessel is turned over to him for the purpose",

but it was further held that even if the abandonment was objectionable because of the indefiniteness of a reservation

of title therein contained, the *rejection having been absolute*, it was a waiver of the objection as to form. We do not overlook the additional fact in that case, that the abandonment contained "an invitation to object to "the form of abandonment if unsatisfactory", but we do not think that material so far as concerns the legal principal upon which the ruling is based. That principle is akin to the one urged on pp. 74, 75 of our original brief, viz: that a general objection is a waiver of specific defects in proofs of loss. (See cases cited in *Ins. Co. v. Johnson* above).

In the case at bar, the language of the witness leaves no doubt, but that *he* understood that it was the intention of assured to abandon, and hence we deem the evidence sufficient.

II.

We desire further to call attention to one or two comments by appellant upon the cases cited by us. We deem the *principles* laid down in *Monroe v. Br. & For. Ins. Co.* as applied to the *particular facts of this case*, as conclusive in our favor of the propriety of the instructions complained of. It is, however, said that the *Monroe* case holds "that testimony that the salvors refused to give up "the salved cargo is too general to constitute proof that "due diligence was used", brief pp. 7 and 8.

Perhaps so, but it seems incredible that appellant sees no more in this record than, as in the *Monroe* case, the bare statement of one witness "unsupported by detail". On

pages 6 to 10 both inclusive of our original brief we have attempted to outline some of the facts pertinent to this question. In the same connection appellant says: "It " is also pointed out in that case that where a part of " the cargo arrives at its destination a total loss cannot " be claimed". But is that so? The language of the court is as follows: "As part of the cattle arrived at Berken- " head, an absolute total loss cannot be made out, *unless* " as already said, the plaintiff shows that the underwrit- " ers directed an unauthorized sale, *or that, with due* " *diligence, he could not have discharged the claim of the* " *salvors*, and thus secured the remnants of the consign- " ment. On important elements making essential parts of " *this* proposition, he has *failed to furnish any proofs;* " and on that account", etc.

In passing let us also notice among other expressions the following, showing a marked difference in the facts of the two cases. The court says: "The further proposition, " that the sale was a legal *or physical necessity*, is also in- " effectual; because, the record fails to show that there " was not sufficient time and opportunity to discharge the " lien of the salvors, and take possession of the cattle, " *before the time of any necessary sale could arrive.* " In this respect the conditions were essentially unlike " those which appeared in *Boudrett v. Hentigg*, Holt, " N. P. 149, where the goods were stolen on a barbarous " coast; *for, in the cases at bar the courts and laws were* " *in the same full vigor when the property arrived* as " in the United States; and presumably *the consignees* " *had opportunity for enforcing all legal rights*" pp. 790-91.

It is scarcely necessary to point out to this court, that in the present case the record shows that the vessel was lying in a dangerous position, that there were no courts and laws in vigor save the one to which the parties appealed, and who decided in favor of the salvors—Capt. Tuttle—let alone the unfortunate illness of their agent, loss of his funds, and absolute lack of means of raising money, in what was then, to all intents and purposes "a barbarous coast".

In considering the *Monroe* case, it must not be forgotten, that the policy there considered was against *absolute total loss only* (p. 778). Hence it is inapplicable to the questions we raise in our case of a constructive total loss.

Appellant also attempts to distinguish the *Boudrett* case by the suggestion that there the goods were "wrecked " upon a *foreign* shore and were destroyed by the *foreign* " inhabitants resident there" while "In the case at bar " the goods were not wrecked upon a foreign shore and " were not destroyed. They remained on board the ship " and while thereon *were towed to the port of destination* " *and arrived in specie*". But appellant has overlooked the fact that in the *Boudrett* case the "foreign shore" upon which he lays such stress was also *the port of destination*, and that some of the goods *were saved there and got on shore*, and were afterwards plundered by the natives. Hence, part of them also "arrived in specie".

Neither do we concede that in the case at bar the cargo arrived in specie at the port of destination, within the meaning of that term as applied to the insurance contract, for as already pointed out, the insurance did not cease on

dropping anchor as in the ordinary insurance between named ports, but ran "until 30 days after arrival at port " of destination", and before that time had expired, the whole transaction had culminated.

We deem it unnecessary to refer to the other matters touched on in the reply of appellant, because we feel that they are amply treated in our original brief.

Respectfully submitted,

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